

Procreation as Resistance: ART, Reproductive Justice, and Queer Families

ABSTRACT

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The U.S. government has too frequently used the denial of access to procreation and/or parenting to show disdain for some of its citizens. Our history and present include shameful periods of sterilization abuse of women of color, especially Black women, people with developmental disabilities, and poor people; removal of Indian children from their parents so they could be “civilized” in boarding schools; states transferring custody of children away from lesbian moms based on sexual orientation; and more. All of this done in the name of protecting “real” or “natural” families” and ensuring that only the best genes got passed from one generation to the next.

As Laura Mamo wrote in her book, *QUEERING REPRODUCTION*, “Nothing within biology demands the nuclear family. It is a cultural and social system enforced by regulations and reinforced by legal discourses, medical practices, and cultural norms.”¹ In the last 50 years, the rise of single parent households, unmarried partners with children, families headed by same-sex couples, and pregnancies by trans men have significantly impacted how the law understands and regulates access to procreation and parenting. That many queer families with children are formed with the assistance of reproductive technology only makes things ever more complicated. The law has had to deal with new questions of parental rights and responsibilities when the person who gestates a child has no genetic relationship to the child as in gestational surrogacy or where more than two people wish to be legal parents to a child.

Victories in the realm of family law have been a key marker of success in the quest for LGBT equality, but advances for some do not always mean advances for all. Using reproductive justice theory, this essay considers how the world of assisted reproduction has created potential conflicts between marginalized groups. The essay focuses primarily on the ways in which gay men enter into commercial relationships in an industry that potentially exploits women in a variety of ways. Two examples of risky practices in this context are the sale and purchase of eggs in a market that frequently underpays women and underplays the physical risks of extracting eggs in order to make them available for sale. The second example is same-sex male couples who hire gestational or traditional surrogates to bear children for them, which implicates these buyers in a market for reproductive services that potentially exploits low-income women and/or women of color.

Just as there was a robust critique from the LGBT community about the “normalizing” agenda of marriage equality and the ways in which that agenda reinforced the concept of the nuclear family, the fertility industry facilitates the creation of same-sex families with children and perhaps warrants a similar critique. The point here is not that gay men, or any particular group of people should be banned from or should refuse to participate in the fertility industry. Rather, the question is what role, if any, these market players can or should play in helping to build a market that is just for buyers and sellers.

¹ Laura Mamo, *QUEERING REPRODUCTION* 5 (2007).

Everyone is Unmarried for at Least Part of Their Life: Queer Disruption as Public Service

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ABSTRACT

In this paper I call on us¹ to think differently about our work on behalf of queer families. As we fight for ways to make queer family lives more livable, I argue that we should actively frame these fights as working toward broader relational liberation for the public at large. Problems faced by LGBTQ² families often share important features with the problems of non-LGBTQ families, especially in racially and economically oppressed communities. This in turn means that interventions on behalf of LGBTQ families could potentially benefit these other families as well—but only if they disrupt the underlying structures that produce the shared problems. I suggest that LGBTQ people have a distinctive capacity to play this role thanks to our social and historical position, which gives us unique insight into the operation of family regimes while also locating us in an unusually broad range of communities. As trends accelerate toward greater family diversity, and as the growing threats of climate change and racialized nationalisms intensify the pressure placed on caring relationships of all kinds, queer people have a vanguard role to play in building and protecting space for all caring relationships to flourish.

To play that role, I call on us to adopt a spirit of what I call *queer disruption as public service* in our queer family work. By this phrase I mean that we should aim to disrupt those structures that harm multiple, broad segments of both queer and non-queer oppressed people. Disruption as public service requires a complex and holistic understanding of the structures that condition the harms we face, structures that are not only legal but often—and often more importantly—economic, institutional, political, ideological, or cultural. This work also requires understanding the different ways that these structures play out for the diverse range of people they affect. It is difficult work, but it is also potentially transformational work that we are uniquely positioned to perform.

In the symposium, I will first explore this idea by examining the ways that same-sex marriage has, and has not, positively disrupted the structures that shape relational³ life. A key

¹ By “us” I mean all queer people, broadly defined, as well as the people who work on our behalf.

² LGBTQ terminology is complex and fluid. In this abstract and the subsequent paper, I will use different terms at different times that best fit the particular context, while acknowledging all terms as slippery. In particular, I generally use “LGBTQ” terminology to refer to conventional identity-based, civil-rights approaches to LGBTQ issues; and “queer” to refer to more radical and transformational approaches not grounded in identity per se.

³ As with LGBTQ/queer terminology, I use “family” and “relationship/relational” as two closely related but distinct terms that carry different political implications. While I start the abstract primarily using “family” in order to connect my argument to the terms of the symposium discussion, here I switch to the broader language of

shortcoming in this regard is that marriage remains the gateway for a host of legal benefits and social privileges, even as marriage itself continues to become less common. At any given time, growing numbers of US adults are unmarried, and indeed virtually *everyone* is unmarried for at least part of their life. The continuing *maritonnormativity* of relationship regimes—i.e., the structuring of these regimes around the assumption that marriage is the most important and valuable relationship—makes life unnecessarily difficult for a broad range of caring relationships. Same-sex marriage, whatever its other benefits, has done nothing to change that.

Nonetheless, queer people are still more likely to be unmarried than the population at large. We continue to have particular exposure to what is an increasingly universal experience: i.e., depending for our care on non-marital relationships that are un- and under-recognized in existing relationship regimes. Dislodging marriage from the center of relationship regimes is a revolutionary project that will ultimately require major law reform. But in this paper I also urge us to look for smaller opportunities in our own work to disrupt restrictive relational structures. Drawing on examples from the United States and from my own research in South Africa, I highlight some of the ways that the challenges facing queer relationships reflect broader oppressions, and some strategies that could disrupt those broader oppressions for public benefit.

“relationship,” which I mean to encompass all families as well as all caring relationships not recognized as “families.”

LGBTQ Rights in the Fields of Family Law and Reproductive Rights Summary Overview

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I. Before Marriage Equality.

a. Adoptions - in non-marriage recognition states and states without second parent adoption (like Virginia), only one parent could adopt; home studies written as one spouse as the "room-mate;" could achieve a joint custody order in most instances - but not the same (see Adoption versus Custody chart). Same-sex couples discriminated against in qualifying to be foster parents.

b. Assisted Reproductive Technologies. Gay men using a surrogate - often could only get the biological dad declared the dad. Lesbian couples using donor sperm - non gestating parent not recognized - could get joint custody order. In marriage recognition states - step-parent adoption could be done. In some non-recognition states second parent adoption could be done. In states like Virginia - could only get joint custody order EXCEPT if reciprocal IVF - one parent gestational mom and one genetic mom - could use parentage statutes to get Order of Parentage as to both. See Hayman RTD and VLW articles.

II. After Marriage Equality to the Present. Note marriage equality came earlier to Virginia in October 2014 - in *Bostick v Rainey* - prior to *Obergefell* SCOTUS ruling.

a. Adoptions. Now same-sex married couples could adopt together and also do step-parent adoptions. Note however issues with judges not granting the step-parent adoptions viewing them as not needed - see the Hoverman-Bauby Brief.

b. Assisted Reproductive Technologies. Arguably now all children born to a married lesbian couple via a sperm donor or born to a gay married couple using a gestational carrier or surrogate would be the children of both parents. However, note ongoing issues and case law challenges in many states. Obergefell deemed to create a marital presumption but not necessarily a parental presumption. Also many statutes remained not gender neutral. For example, Virginia's Status on Children of Assisted Conception statute at Virginia Code § 20-156, et. seq., still referred to Intended Parents as a married man and woman - and only changed to parent and parent effective July 1, 2019.

III. Unique LGBT Issues.

a. Use of Sperm Donors and Not Obtaining Proper Donor Release. See the Boardwine "Turkey baster" case out of Roanoke.

b. Use of donor embryo and gestational carrier by married gay couple. See the Timmons-Olson Saga and Washington Post article on Jacob's Law.

c. Issues with unfriendly fertility clinic documents. See ASRM LGBT presentation: "Challenges & Controversies in Treating LGBTQ Patients - The Legal Perspective."

- d. Tri-Parenting by Design versus Default. See AAML Article.

IV. Many More Rivers to Cross.

- a. Virginia's Constitution still refers to marriage as between a man and a woman. Other states include but are not limited to: Alabama, Alaska, Arizona, Arkansas, and Florida.
 - a. **Alabama** – Alabama Constitution, Article I, § 36.03(b) – “Marriage is inherently a unique relationship between a man and a woman.”
 - b. **Alaska**- Alaska Constitution Article I, § 1: “To be valid or recognized in this State, a marriage may exist only between one man and one woman.”
 - c. **Arizona**- Arizona Constitution Article XXX, §1: “Only a union of one man and one woman shall be valid or recognized as a marriage in this state.”
 - d. **Arkansas**- Arkansas Constitutional Amendment 83, §1: “Marriage consists only of the union of one man and one woman.”
 - e. **Florida**- Florida Constitution, Article I, § 27: “Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.”
- b. Ability of faith based licensed adoption agencies being able to legally discriminate against LGBT families. See Virginia Code §63.2-1709.3(D). Other states include Alabama, Kansas, Mississippi, North Dakota, Oklahoma, South Carolina, South Dakota, Texas.
- c. Continued Challenges still require same-sex couples to obtain court orders and not rely on birth certificates alone.

Mom, Mommy & Daddy and Daddy, Dad & Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parenting

by

Colleen M. Quinn*

I. Introduction

With the increasing use of assisted reproductive technologies (“ART”), including gamete (sperm, egg, and embryo) donation and the use of gestational carriers and traditional surrogates, particularly coupled with the recognition of same-sex marriages and other societal factors, our world is facing a new frontier of family formation. This new frontier includes the recognition of more than two legal parents for a child. In most ART arrangements, the intended parents, donors, and gestational carriers or surrogates, their respective attorneys, and other involved professionals, are focused on ensuring and securing the legal parentage of just two resulting parents. In other words, in most ART situations, the donors (whether sperm, egg, or embryo) and the carrier-surrogates want to be “off the hook” as to any and all legal parentage responsibilities. Thus, donation agreements and relevant statutes are pivotal to establishing the intent of the donor to be only a donor of genetic material and not a parent. Likewise, gestational carrier or surrogacy agreements are replete with language clarifying that the carrier-surrogate will not be a parent and does not intend in any way to be a parent. And, on the other hand, in most instances the committed “duo” of intended parents want to ensure that they are the only two possible parents “on the hook” as the legal parents and that no one else in the ART arrangement can claim parentage.

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A. Tri-Parenting by Design Versus by Default

In less frequent but evolving ART situations, some “parents” voluntarily plan in advance to seek legal recognition of more than two parents who are involved in the child’s creation and/or the parenting process. In these ART situations, all of the involved parties “by design,” or by choice, decide that the child they plan to create will have more than two parents. Hence the concept of multiple parents or “tri-parenting by design” has developed. On the other hand, there also are cases where there is tri-parenting “by default,” or by chance. These cases may involve ART but the necessary legalities (such as a valid sperm donor release) were not followed. Or they might not involve ART at all but might be the result of extra-marital conjugal relations (such as the wife or husband having a child as the product of an extra-marital affair). These default case outcomes, even where ART was not involved, still are relevant to whether tri-parenting arrangements will be upheld.

B. Variations in Establishing Parentage

With the evolution of ART, along with other societal changes, we now are seeing parentage being established in a variety of ways. These ways include: by birth, adoption, genetics (with DNA testing), orders of parentage (including pre-birth orders), marital presumption, various types of custody arrangements, and by de facto parentage (also referred to as psychological, functional, equitable, or intent-based, among other descriptions). The ART arrangements can include: the use of donor or contributor sperm, egg, or embryo, as well as the use of gestational carriers and genetic (true or traditional) surrogates, and the evolution of reciprocal in vitro fertilization (“IVF”) whereby one mom serves as genetic mom and the other as gestational mom. The societal changes include, but are not limited to: the growing acceptance of cohabitation and non-marital parenting arrangements, marriage equality for same-sex couples, the increased frequency of divorce and remarriage, the increased recognition of polyamory, and the easy inexpensive access to genetic testing (through such sites as Ancestry.com and 23andMe.com).

C. Variations in Parenting Rights and Responsibilities

Given the above, it should come as no surprise that children increasingly are being parented, or at least subject to the parenting influence and/or duties, of more than two parents. This evolving world of multi-parenting is also challenging traditional concepts of a parent's rights and responsibilities with regard to a child. These varying rights and responsibilities include:

- The duties of care, custody and support,
- Inheritance rights (of both child and parent),
- Visitation rights,
- The right to make legal, medical, educational, and other decisions for the child,
- The child's eligibility for social security and other state or federal benefits,
- Ability to claim the child as a dependent,
- Insurance (health, automobile, life) coverage qualifications,
- Tort liability of the parent,
- Ability to bring suit on behalf of the child,
- The right to travel or move with the child,
- The right to discipline or guide in moral and religious beliefs,
- Access to all of the child's educational, medical, and other records,
- Responsibility for the child's medical bills and other debts,
- The right to the child's earnings, and
- Being subject to criminal implications and child protective service consequences for violating laws or standards for abuse, neglect, abandonment, truancy, and the like.

This article examines:

- (1) the current state of the law, both by statute and published case law,¹ in the United States and elsewhere,

¹ This article attempts to capture as many existing known published cases as possible and also includes some limited information regarding unpublished cases. However, given the difficulty of accurately capturing all of the unpublished decisions that might exist, it cannot be considered a fully complete

- regarding the legal recognition of three parent arrangements and the theories used;
- (2) the current state of legal authority or ability to place more than two parents on a birth certificate;
 - (3) some of the unpublished case law for multiple parents; and,
 - (4) the arguments favoring and disfavoring “multiple” parent recognition.

This article does not examine the following:

- (1) the many cases that exist where third parties seek to take custody from or supplant the biological or legal parent due to that parent being unfit;²

compilation. Moreover, many of the unpublished cases have been placed under court seal and are not available to the public or must be heavily redacted to protect party identity.

² See, e.g., *In re Marriage of Rudsell*, 684 N.E.2d, 421, 426 (Ill. App. Ct. 1997) (“A third party seeking to obtain or retain custody of a child over the superior right to the natural parent must demonstrate good cause or reason to overcome the presumption that a parent has a superior right to custody *and* further must show that it is in the child’s best interests that the third party be awarded the care, custody and control of the minor.”) (emphasis in original); *Montgomery Cnty. Dept. of Soc. Servs. v. Sanders*, 381 A.2d 1154, 1161 (Md. Ct. Spec. App. 1977) (“When the dispute is between a biological parent and a third party, it is presumed that the child’s best interest is sub-served by custody in the parent. That presumption is overcome and such custody will be denied if (a) the parent is unfit to have custody, or (b) if there are such exceptional circumstances as make such custody detrimental to the best interests of the child.”); *Tubwon v. Weisberg*, 394 N.W.2d 601, 603 (Minn. Ct. App. 1986) (“In determining custody of MKT, the court cited *Wallin v. Wallin*, 290 Minn. 261, 187 N.W.2d 627 (1971), which establishes the standard for awarding custody to third parties over the objection of a biological parent.”); *In re Guardianship of Lavone M.*, 610 N.W.2d 29, 40 (Neb. Ct. App. 2000) (“A court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right; neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child.”); *Bodwell v. Brooks*, 686 A.2d 1179, 1183 (N.H. 1996) (“Once the superior court has acquired jurisdiction over a custody proceeding between unwed natural parents, it may use its *parens patriae* power to decide whether the best interest of the child warrants the intervention of a stepfather as an appropriate party in the custody determination.”); *K.B. v. J.R.*, 26 Misc.3d 465, 887 N.Y.S.2d 516, 521 (2009)

- (2) those cases where a third party is seeking de facto (also called psychological or functional or equitable, among other things) parentage but is not doing so to be recognized as a third parent to the child or where there are not already two parents;³ and,
- (3) the many cases, including unpublished cases, where a third party might be awarded some visitation while the child maintains two primary parents.

Instead, this article seeks to explore existing statutory authority (with or without supporting case law) that permits the recognition of more than three legal parents, as well as those cases in which at least three parents play such a significant role in the child's life that all three have obtained some heightened recognition by the court as parental figures. Note that there still are extremely limited situations where more than two parents legally will be recognized as full equal and legal parents. However, there are numerous anecdotal articles in the media and even in published legal treatises claiming that a case represents one in which

("Intervention by the State in the right and responsibility of a natural parent to custody of her or his child is warranted if there is first a judicial finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the child."); McDonald v. Wrigley, 870 P.2d 777, 779 (Okla. 1994) ("But courts have long held that statutory language similar to that in § 108 and § 112 is sufficient for a divorce court to award custody of a minor child to a third party when the parents are unfit.").

³ For example, in the case of *In re Custody of B.M.H.*, 315 P.3d 470 (Wash. 2013), the biological father of a child was killed and the male petitioner stepped in to help the mother. The male petitioner was with the mom when the child was born and then later married the mother, though they divorced a few years later. During the marriage, the male petitioner was the child's step-father and a joint caretaker. No step-parent adoption had been done. The mother later remarried and the male petitioner filed for non-parental custody of the child. The Washington Supreme Court found that the male petitioner had failed to show adequate cause to grant the non-parental custody request, but did believe that the petitioner's status as a former stepfather entitled him to being a de facto parent of the child. In deciding this, the court noted that he had undertaken a permanent parental role with the child and had the mother's consent. Interestingly in this case, the Court found that the petitioner did not meet "the high burden imposed on those seeking third party custody. However, we find he is entitled to maintain his de facto parentage action." *Id.* at 472.

more than two parents have been recognized. Yet, upon close examination, most of those cases do not actually represent the issue of three (or more) substantially involved parents seeking legal recognition.

There also currently are very limited documented situations where more than two parents are being placed on the birth certificate of the child. However, this concept is expected to evolve rather quickly in the next few years and this article attempts to capture those countries or states that presently permit more than two parents to be placed on the birth certificate.

II. Tri-Parent Recognition by Statute or Published Case Law

A. States and Countries with Statutory Authority for Multiple Parents

As of the date of this article, there appear to be four states, one country, and one province within a country that have enacted statutory language acknowledging multiple parents. They are: California, Maine, Washington (state), and Louisiana (dual paternity), the province of Ontario, Canada, and the country of Brazil (dual paternity). Another state (Vermont) also is in the process of adopting statutory language similar to that adopted by the state of Washington which may have passed and gone into effect by the time this article is published.

1. California

In California, Family Code section 3040(d), which was enacted in 2013, states as follows:

In cases where a child has more than two parents, the court shall allocate custody and visitation among the parents based on the best interest of the child, including, but not limited to, addressing the child's need for continuity and stability by preserving established patterns of care and emotional bonds. The court may order that not all parents share legal or physical custody of the child if the court finds that it would not be in the best interest of the child as provided in Sections 3011 and 30.⁴

Moreover, California Family Code section 7612(c), enacted in 2014, addressing parentage, states:

⁴ CAL. FAM. CODE § 3040(d) (Deering 2017).

In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.⁵

Notably, in 2011, prior to the statutory recognition of more than two parent situations, an appellate court in California upheld the lower court's recognition of a tri-parent situation. *In re M.C.*⁶ involved a case where the child's biological mother, her wife, and the biological father were all the child's presumed parents. In that case the child was born during the marriage of the two women but was the result of a premarital relationship between one of the women and a man. The non-biological mother was a presumed parent because she was married to the biological mother at the time of the child's birth. The biological father could be considered a presumed parent because he promptly came forward and demonstrated his commitment to his parental responsibilities to the extent that the biological mother and the circumstances allowed. Although the case was remanded for the lower court to make further findings, the appellate court clearly gave the nod of approval to the concept of three presumed parents prior to the statutory changes.

2. Maine

Section 1853 of the Maine Parentage Act, entitled "Consequences of Establishment of Parentage," enacted in 2015 but which went into effect in 2016, states: "Preservation of parent-child relationship. Consistent with the establishment of parentage under this chapter, a court may determine that a child has more than 2 parents."⁷ Under the Maine Parentage Act, the law established eight primary mechanisms for establishing parentage: by birth, adoption, acknowledgment, presumption, de facto par-

⁵ CAL. FAM. CODE § 7612(c) (Deering 2017).

⁶ 195 Cal. App. 4th 197, 123 Cal. Rptr. 3d 856 (2011).

⁷ ME. STAT. tit. 19 § 1853(a)(2) (2015).

entage, genetic parentage, assisted reproduction or gestational carrier agreement.⁸

The Act most importantly lays out specific requirements and findings for presumed parents and de facto parents. Under the “Presumed Parentage” part of the Act, a marital presumption is established so that the person married to the person giving birth (except for a surrogate) is a presumed parent.⁹ Moreover, where the parties are not married, a nonmarital presumption of parentage can be established if the person:

- (a) lived with the child from the time the child was born or adopted, and for a period of at least two years thereafter, and,
- (b) assumes personal, financial or custodial responsibilities for the child.¹⁰

Under the Act, a court can recognize a de facto parent if that parent can show by “clear and convincing evidence” that the person “has fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in the child’s life.”¹¹ Facts sufficient to meet the legal requirements include:

- (a) the parent has lived with the child for a significant amount of time;
- (b) the parent regularly takes care of the child;
- (c) a bonded and dependent relationship is established between the child and the parent;
- (d) another parent of the child has understood, acknowledged, supported, or encouraged the de facto parent in forming and having this close, relationship with the child;
- (e) the parent has taken on complete and permanent responsibilities as a parent of the child and not because paid to do so; and
- (f) it is “in the best interests of the child” to continue having this parent-child relationship¹².

⁸ ME. STAT. tit. 19 § 1851 (2015).

⁹ ME. STAT. tit. 19 § 1881 (1) (2015).

¹⁰ ME. STAT. tit. 19 § 1881(3) (2015).

¹¹ *Id.*

¹² *Id.*

3. *Washington*

The newest version of the Uniform Parentage Act (UPA), approved in July 2017 by the National Conference of Commissioners on Uniform State Laws, expressly includes a provision for a child to have more than two legal parents. Section 613(c), Alternative B, when addressing competing parentage claims, states: “The court may adjudicate a child to have more than two parents under this [Act] if the court finds that failure to recognize more than two parents would be detrimental to the child.”¹³ Washington state has adopted this newer version of the UPA as it was signed into law by the Governor on March 6, 2018 (Senate Bill 6037) and will be effective as of January 1, 2019.¹⁴ Note that the Washington Parentage Act contains similar provisions to Maine’s Parentage Act with regard to establishing de facto parentage.

4. *Louisiana*

In 2005, in response to evolving case law discussed further below, the state legislature revised the Louisiana State Civil Code to better acknowledge the possibility of dual paternity (two fathers in addition to the mother) in Articles 197 and 198. Article 197 lays out the child’s right to the dual paternity cause of action under which a child can institute an action to prove paternity even if the child is presumed to be the child of another man.¹⁵ The action can even be brought after the death of the alleged father but must be brought within a year of the death and shown by clear and convincing evidence as a higher burden of proof.¹⁶

Moreover, Article 198 lays out the biological father’s right to a paternity cause of action, even where the child is the presumed child of another man, under which a man can institute an action at any time unless (a) if the child is presumed to be the child of another man, the action must be instituted within one year from the day of the birth of the child; or (b) if the mother in bad faith deceived the father of the child regarding his paternity, then the action can be instituted within one year from the day the father knew or should have known of his paternity, or within ten years

¹³ Washington SB 6037 (2017).

¹⁴ *Id.*

¹⁵ LA. CIV. CODE 197 (2005).

¹⁶ *Id.*

from the day of the birth of the child, whichever occurs first.¹⁷ In any event, any action cannot be brought any later than one year from the day of the death of the child.¹⁸ Moreover, other Articles in the Civil Code address the presumption of the husband. Among others, the more pertinent ones are set out in Articles 185 and 195. Under Article 185, a marital presumption is established whereby the husband of the mother is presumed to be the father of a child born during the marriage or within three hundred days from the date of the termination of the marriage.¹⁹ Moreover, parentage can be established under Article 195 where a man marries the mother and holds himself out as the father. The statute indicates that so long as no other man has been filiated with the child, then if that man marries the mother and “with the concurrence of the mother, acknowledges the child by authentic act,” then he is presumed to be the father of that child.”²⁰ There also are provisions for disavowing paternity.²¹

The effect of the Louisiana statutory scheme is that a married man might be the presumed and legal father but not the biological father of a child. Then, either the child or the biological father may later sue to recognize the biological father without displacing the presumed father – thus leading to dual paternity.

The changes to the Louisiana Civil Code were prompted by two prior cases. In the case of *T.D. v. M.M.M.*,²² decided by the Supreme Court of Louisiana, the plaintiff had an affair while married, and during the marriage permitted the lover to visit the child regularly until she divorced, at which point she denied him access to the child. While other factors, such as the timeliness of bringing a cause of action, were considered, the court made it clear that:

several policy factors favor allowing a biological father to avow his child where such action will result in dual paternity. First a biological father is susceptible to suit for child support until his child reaches nineteen years of age. La. Civ. Code. art 209. Second, a child who enjoys legitimacy as to his legal father may seek to filiate to his biolog-

¹⁷ LA. CIV. CODE 198 (2005).

¹⁸ *Id.*

¹⁹ LA. CIV. CODE 185 (2005).

²⁰ LA. CIV. CODE 195 (2005).

²¹ LA. CIV. CODE 187 (2005).

²² 730 So. 2d 873 (La. 1999).

ical father in order to receive wrongful death benefits or inheritance rights.²³

Thus, the court focused on the benefits available to the child via legal recognition of dual paternity.

Another earlier Supreme Court of Louisiana case likewise opines on the benefits of dual paternity. In *Smith v Cole*, the mother of a thirteen-year old brought a filiation action against the biological father. The court noted:

Louisiana law may provide the presumption that the husband of the mother is the legal father of her child while it recognizes a biological father's actual paternity. When the presumptive father does not timely disavow paternity, he becomes the legal father. A filiation action brought on behalf of the child, then, merely establishes the biological fact of paternity. The filiation action does not bastardize the child or otherwise affect the child's legitimacy status. The result here is that the biological father and the mother share the support obligations of the child.²⁴

The court further noted that whether the legal father should share in the support obligations for the child was not before the court.²⁵

5. Canada

In the province of Ontario, Canada, the Children's Law Reform Act ("CLRA") Chapter C.12 (1)(4) states:

If, under this Part, a child has more than two parents, a reference in any Act or regulation to the parents of the child that is not intended to exclude a parent shall, unless a contrary intention appears, be read as a reference to all of the child's parents, even if the terminology used assumes that a child would have no more than two parents.²⁶

Prior to the enactment of the statute, the Ontario Court of Appeals recognized three parents in the case of *A.A. v. B.B., et al.*²⁷ In that case A and her partner C had been in a stable same-sex union since 1990, and in 1999 they decided to start a family with the assistance of their male friend B. They thought it was in the child's best interest that B remain involved in the child's life. C, the biological mother, and B, the biological father, were the

²³ *Id.* at 876.

²⁴ 553 So. 2d 847 (La. 1989).

²⁵ *Id.* at 855.

²⁶ Ontario Children's Law Reform Act, R.S.O. 1990, c. 23, s. 1 (1) (2016).

²⁷ 83 O.R. (3d) 561 (Ct. App. Ontario 2007).

child's legal parents but wanted A, the non-biological parent, to be recognized as a mother. A and C did not apply for an adoption order because that would cause B to lose his parental status. Instead, A brought an application for a declaration that she was the child's mother. While the lower level judge felt without authority to grant the application, the appellate court held that its "inherent *parens patriae* jurisdiction" could be applied "to rescue a child in danger or to bridge a legislative gap."²⁸ The court's analysis is worth noting verbatim:

A legislative gap existed in this case. The purpose of the CLRA was to declare that all children have equal status. At the time, equality of status meant recognizing the equality of children born inside and outside of marriage. The legislature had in mind traditional unions between one mother and one father. It did not legislate in relation to other types of relationships because those relationships and the advent of reproductive technology were beyond the vision of the Law Reform Commission and the Legislature of the day. Present social conditions and attitudes have changed. *Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the CLRA's legislative scheme.*²⁹

The court went on to look at the fact that it was contrary to the child's best interests that he "was deprived of the legal recognition of the parentage of one of his mothers" especially given the child's own statement "I just want both my moms recognized as my moms." The child also noted: "It would help if the government and the law recognized that I have two moms. It would help more people to understand. It would make my life easier. I want my family to be accepted and included, just like everyone else's family."³⁰ The court also recognized the lesbian moms' fear about the death of the biological mother, leaving the child with her biological father but without her other mother or any mother.³¹

6. *Brazil*

On September 21, 2016, the Brazilian Federal Supreme Court decided an extraordinary appeal that recognizing dual paternity (referred to in Brazil as the concomitance of paterni-

²⁸ *Id.* at 572.

²⁹ *Id.* at 563 (emphasis added).

³⁰ *Id.* at 568.

³¹ *Id.*

ties).³² The facts involved a woman raised by her “affective-based” father who, when she was 18, discovered that he was not her biological parent. To guarantee her legal rights as to her biological father and determine her ancestry she brought suit including asking for a DNA test.

Like Louisiana, Brazil has a statutory backdrop recognizing the possibility of dual paternity. Article 48 of the Child and Adolescent Statute³³ in Brazil provides that the origin of paternity is biological. However, Article 1.593 of the 2002 Civil Code in Brazil establishes that paternity might be “affective.” The Brazilian Court actually looked to and cited Louisiana law and statutes in rendering the decision to find that the now adult child could establish dual paternity and that the statutory scheme in Brazil permitted such an outcome.

B. States and Countries with Published Case Law on Multiple Parents

More states and countries also are recognizing more than two parents through published case decisions. Tracking the case law is difficult because evidently numerous unpublished cases exist. However, published decisions increasingly are coming into existence. The primary justification for recognition of more than two parents usually is based on the theory of the de facto, also referred to as equitable or psychological, parent. Another approach is to balance the decision based on the totality of the circumstances and best interests of the child, including, among other things, looking at the contact the putative parent has had with the child, their role in the child’s life, the child’s perception of their role, and other factors. Some of these cases do not give full legal parental rights to de facto or psychological parents, but this article includes those cases where the court did grant fairly extensive custodial and/or other extensive parental rights.

The countries recognizing more than two parents by case law include the province of Ontario in Canada as discussed above (followed by statutory enactment) as well as Brazil, also discussed above, whereby the case decision was based on already existing statutes allowing for dual paternity. The states that have

³² (RE) No. 898.060 (Brazil 2016).

³³ Brazil Law 8.069 (1990).

recognized three legal parents, or have given a third parent significant legal recognition, by common law include: Delaware, Louisiana, Minnesota, New Jersey, New York, North Dakota, and Pennsylvania.

1. *Cases Using the De Facto, Equitable, or Psychological Parent Analysis*

The states that have utilized the de facto, equitable, or psychological parent method, also sometimes called functional parenthood, to recognize tri-parents, in order of most recent to less recent, include: New Jersey, Delaware, North Dakota, and Pennsylvania.

While not a three-parent case, in *Conover v. Conover*,³⁴ the Maryland Court of Appeals set out a four-prong test (adopted from the often used test of the Wisconsin Supreme Court) for de facto parentage that appears helpful to and used in several tri-parent cases. In *Conover*, a same-sex female couple decided to have a child together, so one of the parties was artificially inseminated by an anonymous sperm donor. After the child was born, the two parties married. They later divorced, and the biological mother wanted to deny parental rights to her former partner. The former partner argued that she had a right to visitation of the child as a de facto parent. Under Maryland law as it stood, de facto parents did not have equal rights as legal parents to contest custody or visitation. The Maryland Court of Appeals reversed precedent and held that de facto parents were different from “third parties” under the law and had standing to contest custody or visitation under the “best interests of the child” standard. The court adopted the four-part test used by the Wisconsin Supreme Court in *In re Custody of H.S.H-K*,³⁵ for finding de facto parent status which is as follows:

³⁴ 141 A.3d 31 (Md. Ct. App. 2016).

³⁵ 533 N.W.2d 419 (Wis. 1995), *cert. denied*, 516 U.S. 975 (1995). *Holtzman v. Knott (In re H.S.H-K)* actually was a two-parent dispute case where a female same-sex couple had a child together using an anonymous sperm donor. Knott carried the child and Holtzman was present throughout the pregnancy and well into the early years of the child’s life. After the relationship between Knott and Holtzman soured, Knott attempted to prevent Holtzman from getting any visitation rights on the basis that Holtzman was never legally the child’s parent and was not the biological parent. Holtzman sought a transfer of custody and visitation rights. The Wisconsin court held that Holtzman must first prove

- (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child;
- (2) that the petitioner and the child lived together in the same household;
- (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education, and development, including contributing towards the child's support, without expectation of financial compensation; and,
- (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

The case was remanded for further fact finding on the issue of whether the biological parent interfered with the parental relations and if the non-biological parent had satisfied the four-part test.

a. *New Jersey*

*D.G. v. K.S.*³⁶ was a case decided by the New Jersey Superior Court, in which a biological mother entered into a "tri-parenting" agreement with two men, who were a gay couple. This was a multiple parenting by design case. They used one man's sperm, the woman's egg, and gave the other man's last name to the child. They all agreed to co-parent the child and were active in the child's life. Several years later, the woman wanted to move with the child to California, which the two men protested. The man who was not the biological father of the child sought an order to be named the "psychological parent" of the child because he had been in a parental role to the child for six years.

The court upheld the tri-parenting agreement on the grounds that the non-biological dad was the psychological par-

under the above noted four-part test that she had a parent-like relationship with the child; and then prove there was a significant triggering event by demonstrating that Knott has interfered substantially with the child's relationship with Holtzman, and finally show that Holtzman petitioned the court promptly after Knott's interference.

³⁶ 133 A.3d 703 (N.J. Super. Ct. 2015).

ent, but denied him full legal parentage on the ground that a legal relationship could only stem from “the mother and child relationship and the father and child relationship” or a legal adoption.³⁷ The court also referenced that under the Parentage Act adopted in New Jersey that legal parentage could only be established in three ways: “genetic contribution, gestational primacy or adoption.”³⁸ The court was sympathetic to the non-biological father, but ultimately believed that changing ways to get legal parentage was something best left to the legislature, not the courts. The court awarded all three parties joint legal and residential custody and equal parenting time, and further held that, even though there was precedent in New Jersey for a psychological parent to pay child support, the psychological (and non-biological) parent could not be compelled to pay child support even though he wanted to do so.³⁹ The court noted that “the facts of this case do not support the elements of equitable estoppel since the biological parents are available to pay child support for the child.”⁴⁰ The court then proceeded to assess the child support obligations as between the two biological parents.

Of note is an earlier New Jersey case, *P.B. v T.H.*,⁴¹ in which the child’s maternal aunt had permanent custody of the child (after the child had been removed from the biological mother and put into foster care) and had allowed a neighbor to become a “psychological parent.” The neighbor filed for custody of the child. The court noted that the seminal test for whether a third party had standing to seek custody as a “psychological parent” was set out in an earlier New Jersey case, *V.C. v M.J.B.*⁴² However, that case basically adopted the four-prong test initially set out by the Wisconsin Supreme Court in *In re Custody of H.S.H.-K*, which is noted above. Of critical note is that in *P.B.*, the court held:

[T]he *V.C.* test was not meant to apply only to domestic partners, step-parents, or those third parties who lived in a “familial setting” with the parent and child. Rather the test was established to avoid baseless

³⁷ *Id.* at 58.

³⁸ *Id.*

³⁹ *Id.* at 61-62.

⁴⁰ *Id.* at 62.

⁴¹ 851 A.2d 780 (N.J. Super. Ct. 2004).

⁴² 748 A.2d 539, *cert. denied*, 531 U.S. 926 (2000).

claims by unrelated third parties. We noted that the language in *V.C.* led to the conclusion that the test was meant to apply to all third parties seeking standing.⁴³

The court in particular noted that the critical first prong of the test was whether the legal parent fostered the formation of the parental relationship between the third party and the child. Also, once the third party is deemed to be the psychological parent under the third prong test, he or she then stands in parity with the legal parent.⁴⁴ The end result was that the New Jersey appellate court upheld the trial court's ruling that the child remain in the custody of the neighbor, thus expanding the realm of those parties who could be found to be *de facto* or psychological parents.

Prior adoption cases in New Jersey also have yielded more than two parents. In *In re Adoption of Two Children by H.N.R.*,⁴⁵ the court held that the step-parent adoption of two children by the same-sex partner would not terminate the rights of the other biological parent.⁴⁶

b. *Delaware – Full Legal Parental Status Given to Both the Biological Parent and the De Facto Parent*

In *J.W.S. v. E.M.S.*,⁴⁷ a case that was decided by the Delaware Family Court in Sussex, the first male petitioner, who was the ex-husband of the child's mother, and the second male petitioner, the man with whom the mother had intercourse around the time of conception, both sought custody and a paternity adjudication under the Delaware statute.⁴⁸ An adjudication was proper. The court found that the presumption of the first male petitioner's paternity was based on a material mistake of fact, that is, the mother's failure to tell him for four years that it was equally likely that the second male petitioner was the biological father. The court thus determined that recognition of both male

⁴³ *Id.* at 786-87.

⁴⁴ *Id.* at 786.

⁴⁵ 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995).

⁴⁶ See also *In re Adoption by A.R.*, 378 A.2d 87 (N.J. Super. Ct. 1997); *Matter of Adoption of Child by J.M.G.*, 632 A.2d 550 (N.J. Super Ct. Ch. Div. 1993).

⁴⁷ Nos. CS11–01557, CS13–01083, 2013 WL 6174814 (Del. Fam. Ct. May 29, 2013).

⁴⁸ DEL. CODE ANN. tit. 13, § 8-606(e) (2012).

petitioners as fathers was in the child's best interest, since the child considered both male petitioners to be her fathers, and both had been involved very deeply in her life. DNA testing established that the second male petitioner was the biological father and overcame the presumption of the first male petitioner's paternity.

The court held that "it is appropriate to give legal parental status to three people in this case: mother as the biological mother, [the second male petitioner] as the biological father, and [first male petitioner] as a de facto parent."⁴⁹ Moreover, the court was able to rely on the Delaware statute for recognition of a de facto parent. Under the Delaware statute, de facto parent status is established if the Family Court determines that the de facto parent:

- (1) Has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent;
- (2) Has exercised parental responsibility for the child as that term is defined in § 1101 of this title; and
- (3) Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.⁵⁰

In rendering the decision that all three were equal legal parents, the court referenced a prior decision, *A.L. v D.L.*,⁵¹ in which the court found that a step-father had established de facto status, thus resulting in an order declaring three legal parents. However, the decision is silent as to which parents were to be listed on the child's birth certificate.

c. North Dakota – Psychological Parent Given Expanded Parental-Custodial Rights

In *McAllister v. McAllister*,⁵² the North Dakota Supreme Court addressed a tri-parenting by default case in 2010 where a

⁴⁹ *Id.* at 23.

⁵⁰ 13 DEL. CODE § 8-201 (2012).

⁵¹ No. 12-07390, 2012 WL 6765564 (Del. Fam. Ct. Sept. 19, 2012).

⁵² 779 N.W.2d 652 (N.D. 2010).

stepfather and the biological mother disputed custody of a child that she had conceived with another man who was the biological father. The stepfather had been a caretaker of the child during the marriage but never adopted the child. Although the stepfather and mother were divorcing, up until that point the stepfather had been actively involved in the child's life. The court noted that it had previously described the role of the psychological parent as a "person who provides a child's daily care and who, thereby, develops a close bond and personal relationship with the child becomes the psychological parent to whom the child turns to for love, guidance, and security."⁵³ The court further noted that the establishment of a psychological parent did not end the trial court's inquiry. Rather, when a psychological parent and natural parent both were vying for custody, the natural parent's "paramount right to custody prevails unless the court finds it in the child's best interests to award custody to the psychological parent to prevent serious harm or detriment to the welfare of the child."⁵⁴ Although the court did find the stepfather to be a psychological parent, the court granted decision making responsibility and primary residential responsibility for the child to the mother.⁵⁵ The court also found that the stepfather was the psychological parent and granted him reasonable visitation as well as other expanded rights such as access to school and medical records and to attend educational conferences and to be notified of serious accidents or illnesses and the like.⁵⁶

Of note is that the case involved a dispute between the biological mother and her ex-husband who was the step-father. The biological father was not involved in that dispute. However, the court further noted that its decision was not intended to affect the biological father's parental rights or duties or his support obligations to the child.⁵⁷

⁵³ *Id.* at 658.

⁵⁴ *Id.* (citations omitted).

⁵⁵ *Id.* at 662.

⁵⁶ *Id.* at 661-62.

⁵⁷ *Id.* at 657.

d. Pennsylvania – Three Parents Liable for Child Support

In *Jacob v. Shultz-Jacob*,⁵⁸ the Superior Court of Pennsylvania addressed a situation where the legal mother's former same-sex partner filed an action against the legal mother and the "sperm donor" seeking full legal and physical custody of the mother's two biological and two adopted children. The mother counter-sued for child support. While somewhat inexplicably referred to as the "sperm donor," the biological father of the two biological (not adopted) children was held to be an indispensable party. Notably, the biological father was present at the birth of the children, had provided support to the two biological children since their birth and then for at least four years, had been awarded monthly partial custody and contact, and provided other assistance.⁵⁹ All three parents had been awarded some aspect of custody, and the court's order was upheld on appeal.

While the court did not officially declare three equal legal parents, of particular note in this case with regard to the division of child support is the court's break from tradition and disagreement with the trial court that three parties could not be liable for child support. Instead, the appellate court agreed with the non-biological mother's argument that "since all of the three persons involved in these matters have been awarded formal rights of custody, all three are obligated to provide support."⁶⁰ In finding that all three parents would be liable for support, the appellate court noted:

In the trial court's view the interjection of a third person in the traditional support scenario would create an untenable situation, never having been anticipated by Pennsylvania law. We are not convinced that the calculus of support arrangements cannot be reformulated, for instance, applying to the guidelines amount set for [biological dad] fractional shares to incorporate the contribution of another obligee.⁶¹

The court further noted that the three-way support issue is a matter better addressed by the legislature, but then stated that in the absence of legislative mandates, the courts "must construct a fair, workable and responsible basis for the protection of children, aside from whatever rights the adults may have *vis a vis* each

⁵⁸ 923 A.2d 473 (Pa. Super. Ct. 2007).

⁵⁹ *Id.* at 481.

⁶⁰ *Id.* at 480.

⁶¹ *Id.* at 482.

other.”⁶² The court then affirmed the trial court’s award of custody and vacated the award of support, remanding it to the trial court for the biological father to be joined as an “indispensable party for a hearing at which the support obligation of each litigant is to be recalculated.”⁶³

2. Cases Using the Totality of the Circumstances Approach

The states that have recognized three parents via case law by using the totality of the circumstances approach include Louisiana, Minnesota, and New York.

a. Louisiana – “Tripartite Custody” in the Child’s Best Interests and a Long-Standing History of “Dual Paternity”

In *McCormic v. Rider*,⁶⁴ the maternal grandmother adopted the child. For approximately three years, the parties lived as a family unit in a duplex, with the biological parents residing on one side of the unit and the child living on the other side with the grandmother. The biological parents then ended their relationship, and the father moved out. The following year, the biological parents filed a custody petition, alleging that the grandmother was in ill health and unable to properly care for the child.

The Supreme Court of Louisiana found that because the grandmother had adopted the child, the parents were actually “nonparents” and the grandmother was the “parent” for the purposes of the Louisiana statutes.⁶⁵ However, it found that it would be detrimental to the child if the grandmother maintained sole custody.⁶⁶ Accordingly, the district court awarded joint custody to all three, with the biological mother designated as the domicil-

⁶² *Id.* (citations omitted).

⁶³ *Id.* But compare *Doran v Doran*, 820 A.2d 1279 (Pa. Super. Ct. 2003), where the presumed father, who had divorced the mother, successfully sought dismissal of his child support obligation based on genetic testing that proved he was not the child’s biological father. The court held that the marital presumption no longer applied because he was no longer married to the child’s mother and the equitable estoppel doctrine did not apply because the man only held the child out as his own based on the mother’s misrepresentations regarding his paternity.

⁶⁴ 27 So. 3d 277 (La. 2010).

⁶⁵ *Id.* at 279, citing LA. CIV. CODE ANN. art. 133.

⁶⁶ *Id.*

iary parent. The appellate court noted that “the ‘tripartite’ custody arrangement fashioned by the district court comports with the best interest of the child.”⁶⁷ Citing prior similar decisions awarding custody to both parents and non-parents, the court also noted that “the joint custodial arrangement will further benefit the child by keeping intact the family unit in which he has lived for virtually his entire life.”⁶⁸

Most interestingly, as previously discussed in the statutory authority part of this article, Louisiana also has a somewhat long-standing judicial doctrine of “dual paternity” in which there is a presumption that the husband of the mother is the legal father of her child while also recognizing a biological father’s actual paternity. The precedent set out in that part of this article ultimately resulted in a Louisiana State Civil Code revision in 2005 recognizing dual paternity in Articles 197 and 198 as previously noted.⁶⁹

b. *Minnesota – Quad-Parenting by Design; Tripartite Arrangement Recognized*

In the case of *LaChapelle v. Mitten (In re L.M.K.O.)*,⁷⁰ the female parent Mitten, her female partner Ohanian, and a sperm donor friend, LaChapelle, along with his gay partner, agreed to have a child together. At the time they agreed in writing that LaChapelle would donate the sperm for the artificial insemination of Mitten, that he would not have parental rights, and that Mitten would not hold him responsible for the child. Mitten got pregnant in April 1992 and, in May 1992, the four signed a new agreement that Mitten and her female partner would have physical and legal custody of the child and that LaChapelle and his partner would be entitled to a “significant relationship” with the child.⁷¹ The two women allowed LaChapelle and his partner to have some custody and visitation until around August 1994 when they terminated visitation. Also, in September 1993, without notice to the men, Mitten and her partner filed a petition for

⁶⁷ *Id.* at 280.

⁶⁸ *Id.*

⁶⁹ See *T.D. v. M.M.M.*, 730 So. 2d 873 (La. 1999); *Smith v. Cole*, 553 So. 2d 847 (La. 1989).

⁷⁰ 607 N.W.2d 151 (Minn. Ct. App. 2000).

⁷¹ *Id.* at 157.

Ohanian to adopt the child, stating that the child was the product of artificial insemination, and obtained a final order of adoption. After his visitation rights ended, LaChapelle filed to vacate the adoption based on fraud and also began paternity proceedings. Then, Mitten and Ohanian broke up in the Spring of 1996. All three parties claimed parental rights to the child.

The Minnesota Court of Appeals found that a tripartite arrangement was appropriate in the situation. The court looked to the best interests of the child doctrine which it viewed as a paramount consideration in making a determination in the case.⁷² The court viewed Mitten as the biological mother, LaChapelle as the biological father, and Ohanian as the child's "emotional parent" that the child looked to for "comfort, solace and security."⁷³ The appellate court ultimately affirmed the trial court's grant of sole physical custody to the biological mother Mitten so long as she moved back to Minnesota (where Ohanian and LaChapelle lived) from Michigan, the grant of joint legal custody to Mitten and Ohanian, and the grant of the right to LaChapelle to be able to participate in important decisions involving the child.⁷⁴ Notably the appellate court also upheld the trial court's order that both Ohanian and LaChapelle also had visitation rights and support obligations.⁷⁵

c. New York – Legal Tri-Custody

Dawn M. v. Michael M.,⁷⁶ is a legal tri-custody case where the plaintiff was the wife of the male defendant, who had a biological child with another woman during the course of the marriage (from the facts, this was a polyamorous relationship). The plaintiff acted as a mother to the child, along with her husband (the defendant) and the biological mother. The plaintiff and the defendant broke up and the plaintiff applied for legal custody on the grounds that she had parented the child for more than eighteen months, along with the defendant and the biological mother, and the child considered both women to be equal "mommies." The New York Superior Court found that the child's best inter-

⁷² *Id.* at 163.

⁷³ *Id.* at 164.

⁷⁴ *Id.* at 168.

⁷⁵ *Id.* at 165-66.

⁷⁶ 55 Misc. 3d 865, 47 N.Y.S.3d 898 (N.Y. Sup. Ct. 2017).

ests would be served by granting the plaintiff's custody application, thereby creating a legal tri-custodial arrangement (note that the biological mother and the defendant already shared joint custody of the child).

C. Three Parents Placed on the Birth Certificate

There is limited information available but there appear to be at least one state (Florida) and two countries (Argentina and Brazil) that have permitted three parents to be placed on the child's birth certificate. In another case out of Nevada in 2017, the Supreme Court of Nevada vacated the district court's order that all three parents' names appear on the child's birth certificate without the designation of mother or father, and sent the case back for further consideration of whether Nevada law allowed more than two legal parents.⁷⁷

The issuance of tri-parenting orders whereby all three (or possibly more) parents are declared to be legal parents raises unique situations with the issuance of birth certificates and vital record departments that do not have the correct forms or systems in place. Presumably all parents simply should be called "parent" as opposed to "mother," "mother number two," and "mother number three," just by way of example. One director of a state department of vital records recently opined at an April 2018 Conference of the Academy of Adoption and Assisted Reproduction Attorneys ("AAAA") that maybe a better solution is the issuance of parentage certificates as opposed to changing the child's birth certificate.⁷⁸ On the other hand, what is so difficult about simply listing three (or more) parents – each as "parent"?

1. Florida

In an evidently unpublished opinion, the Miami-Dade Circuit Court held that a sperm donor could be listed on the birth certificate alongside the child's two mothers. The mothers re-

⁷⁷ See *Hammer v. Rasmussen*, 404 P.3d 393 (Nev. 2017).

⁷⁸ Dr. Lou Saadi, "A National Perspective on Vital Records," AAAA Annual Conference (May 1, 2018).

tained sole parental responsibility while the biological father received visitation rights.⁷⁹

2. Argentina

Argentina allowed a same-sex couple and the biological parent of the child to have all three of their names listed on the child's birth certificate.⁸⁰

3. Brazil

A judge allowed three names to be on the baby's birth certificate: two married women and a male friend who helped them conceive.⁸¹

D. Unpublished Tri-Parent Cases in Adoption and ART

There evidently are quite a number of unpublished opinions – including in states that do not have published case law – that are under seal or not searchable or otherwise easily found. Samples of these cases are decisions that have been issued in Alaska,⁸² New Jersey,⁸³ the District of Columbia (Washington,

⁷⁹ Kelli Kennedy, *Gay Sperm Donor, Lesbian Couple Reach Agreement*, YAHOO.COM (Feb. 8, 2013), <https://www.yahoo.com/news/gay-sperm-donor-lesbian-couple-reach-agreement-230442034.html?ref=gs>.

⁸⁰ Thom Senzee, *Argentina Makes History with Three-Parent Birth Certificate*, ADVOC. (May 3, 2015), <https://www.advocate.com/world/2015/05/03/argentina-makes-history-three-parent-birth-certificate>.

⁸¹ Annalee Newitz, *A Baby in Brazil Now Has Three Legal Parents*, 109 (Sept. 18, 2014), <https://io9.gizmodo.com/a-baby-in-brazil-now-has-three-legal-parents-1636577678>. For further reading see also Susan Goldberg, *Three Parents on the Birth Certificate: A First for B.C.*, TODAY'S PARENT (Feb. 13, 2014), <https://www.todaysparent.com/family/three-parents-on-the-birth-certificate-a-first-for-b-c/>.

⁸² See *In the Matter of the Adoption of A.O.L.*, a minor child, Case No. IJU-85-25 P/A (Sup. Ct. Alaska, First Judicial District at Juneau, 1986) (adoption petition was granted but the adoption did “not terminate the parental rights of the natural mother and father of the child.”). See also Jennifer Peltz, *Courts and ‘Tri-Parenting’: A State-by-State Look*, ASSOCIATED PRESS NEWS (June 18, 2017), <https://www.apnews.com/4d1e571553a34cfbb22b72249a791a44>.

⁸³ *In the Matter of the Adoption of an Adult by [Confidential]* (Sup. Ct. N.J., Family Part Middlesex County, Jan. 29, 2009) (adult adoption granted to adoptee while leaving the biological parent rights intact).

D.C.) and Virginia.⁸⁴ Evidently other unpublished opinions exist in other states such as Oregon but this author was not able to procure actual copies of the opinions.⁸⁵

III. Arguments in Favor of and Against Recognizing Tri-Parenting

A. Why Should Courts Routinely Recognize More than Two Parents in Those Cases that Warrant It?

1. Best Interests of the Child

The most common argument for recognizing tri-parenting, which is one advanced by the National Center for Lesbian Rights, is that it is against a child's best interests to not grant parental status to a person who the child has considered a "parent" for their entire life.⁸⁶ In *VC v. MJB* (which was not a tri-custody case but did involve third party visitation), the New Jersey Supreme Court held that

At the heart of the psychological parent cases is recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them. That interest, for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life.⁸⁷

There is significant empirical data that exists to suggest that, regardless of the family structure, children have healthy outcomes when, after their basic needs (food, shelter, clothing, medical care) are met, the family provides, basic physical and

⁸⁴ See *Ex Parte* in the Matter of the Petition of J.B. & W.B. for Adoption of Minor Children, Case No Confidential, (Sup. Ct. Dist. Columbia, Fam. Ct., Apr. 27, 2012) (determining that a relative adoption by a sister and her spouse did not cut off a biological father's rights).

⁸⁵ *Tanya Prashad v Roberto-Luis Copeland, et al.*, Fairfax Cir. Ct. August 18, 2008) (Virginia court was confronted with the issue of, and in fact agreed to, domesticating and registering four agreed upon North Carolina custody orders whereby the true surrogate had secondary legal and physical custody and the same-sex male fathers had primary legal and physical custody).

⁸⁶ See *Bill Clarifies a Judge's Ability to Protect Best Interests of a Child Who Has Relationships with More than Two Parents*, NAT'L CENTER FOR LESBIAN RIGHTS (Feb. 24, 2012), <http://www.nclrights.org/press-room/press-release/bill-clarifies-a-judges-ability-to-protect-best-interests-of-a-child-who-has-relationships-with-more-than-two-parents/>.

⁸⁷ 748 A.2d 539 (N.J. 2000).

psychological safety, love, acceptance, nurture, understanding, structure and guidance, educational opportunities, and encouragement.⁸⁸

2. *Fundamental Human Rights*

Humans have a right to define their identity the way they see fit and the law should recognize identities outside of traditional societal structures. Professor Paula Gerber and researcher Phoebe Irving Lindner observe:

Birth certificates also provide individuals with an identity, both in the practical and abstract sense. Birth certificates afford an individual with legal proof of identity, which is essential for many day-to-day activities. In a report on identity fraud, the United States Department of Health and Human Services observed, “[A] birth certificate issued in the States is the key to opening many doors in our society - from citizenship privileges to Social Security benefits. Such certificates can then be used as ‘breeder’ documents to obtain driver’s licenses, passports, Social Security cards or other documents.”⁸⁹

3. *Anti-Discrimination*

Absent legal protections, parents in a tri-parenting arrangement arguably are discriminated against both legally and in society.⁹⁰ For example, when only two parents are legally recognized, then the third parent is not able to access the child’s medical and school records under most state laws.

4. *Equal Footing Among Parents*

Where the parental rights are limited to two parties (or, in some cases, just the biological parent), the non-biological or third-party parent is at a disadvantage legally when it comes to issues like custody, child support, etc.⁹¹ Also note that de facto/psychological parents have to meet certain requirements in order

⁸⁸ Robert A. Simon, *On Talking with Young Children About Their Non-traditional Families*, 40 ABA FAM. ADVOC. 44 (Spring 2018).

⁸⁹ Paula Gerber & Phoebe Irving Lindner, *Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?* 18 N.Y.U. J. LEGIS. & PUB. POL’Y 225, 235 (2015).

⁹⁰ See Emily B. Gelmann, *What About Susan: Three’s Company, Not a Crowd: The Importance of Allowing Third Parent Adoptions When Both Legal Parents’ Consent*, 30 WIS. J. L., GENDER, & SOC’Y 65-6 (2015).

⁹¹ See Pamela Gatos, *Third-Parent Adoption in Lesbian and Gay Families*, 26 VT. L. REV. 195, 218 (2001).

to be recognized under the law, and those requirements take time to be met; a parent who was present at birth may still have no legal rights to the child until up to several years later, once the requirements are met. There's an additional difficulty due to the fact that the de facto parent must seek actual recognition of his or her status from the court and can't just establish de facto parentage simply by living out the requirements.⁹²

5. *Scientific Advances*

As reproductive medicine continues to develop, new scientific methods may lead to situations in which there are three biological parents. The legal system needs to be prepared to address those issues when they arise.⁹³ For example, new reproductive technologies provide for the DNA in one woman's egg to now be replaced by DNA from another woman's egg especially to prevent mitochondrial disease.⁹⁴ For such an egg from two women, now fertilized by sperm of a man, a child can be created with three biological parents. To similar effect are the reciprocal in vitro fertilization arrangements whereby one mother is the genetic mother who contributes her egg which is then fertilized with sperm from an intentional father and carried by the gestational mother – all with the intent of giving the child three reproductive parents.

6. *Changing Societal Norms*

The traditional family structure is changing over time as social norms evolve. Even thirty years ago, “the ‘traditional’ family - husband and wife, living together with their children – [was] a minority family structure Only twenty-seven percent of

⁹² See Myrisha S. Lewis, *Biology, Genetics, Nurture, and the Law: The Expansion of the Legal Definition of Family to Include Three or More Parents*, 16 NEV. L.J. 743, 769-70 (2016).

⁹³ See James Gallagher, *UK Government Backs Three-Person IVF*, BBC-NEWS.COM (June 28, 2013), <http://www.bbc.com/news/health-23079276>; Ian Sample, *Three-Person IVF: UK Government Backs Mitochondrial Transfer*, THEGUARDIAN.COM (June 28, 2013), <https://www.theguardian.com/science/2013/jun/28/uk-government-ivf-dna-three-people>; Brittany Shoot, *3-Parent IVF: Why Isn't It Available in the United States?*, THEGUARDIAN.COM, (Feb. 27, 2015), <https://perma.cc/C589-8JBF>.

⁹⁴ Sharon Kirkey, *Fertility Doctor Offering to Blend Eggs from Two Women to Make ‘Three-Parent’ Babies*, NATIONALPOST.COM (June 19, 2017).

American households in 1988 consisted of conventional nuclear families.”⁹⁵ Numerous demographic changes have occurred that have exploded the myth that the nuclear family is the conventional familial arrangement: “An increasing number of divorces, heterosexual non-marital cohabitation, openness in same-sex couples, and the growing number of women raising children alone all contribute to the emergence of alternative families.”⁹⁶

7. *Honoring Parties’ Intentions*

The courts should honor the choice that families have made to enter into a non-traditional family structure. “Families of consent can include more than two parents, and decisions within these families to allocate parental status to more than two individuals should be honored.”⁹⁷

B. *What Are the Arguments Against Such Recognition?*

1. *Traditional Definition of “Parent,” Marital Presumptions, and Accepted Family Structure*

Some people believe that the traditional definition of “parent” should be limited to two parties, and people of the opposite sex. This is the determination that the Court of Appeals of Arizona came to in *Riepe v. Riepe*.⁹⁸ The case mainly discussed the concept of in loco parentis, but it’s the bickering between the majority and the dissent about “unhinging” the ties of gender and the number contained within Arizona’s definition of the term ‘parent’⁹⁹ that is of interest.

Moreover, the U.S. Supreme Court noted in *Michael H. v. Gerald D.*, that the child’s

basic claim is not that California has erred in preventing her from establishing that Michael, not Gerald, should stand as her legal father. Rather, she claims a due process right to maintain filial relationships with both Michael and Gerald. This assertion merits little discussion, for, whatever the merits of the guardian ad litem’s belief that such an arrangement can be of great psychological benefit to a child, the claim

⁹⁵ Alexa King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN’S L.J. 329, 379 (1995).

⁹⁶ *Id.*

⁹⁷ Gatos, *supra* note 91, at 218.

⁹⁸ 91 P.3d 312 (Ariz. Ct. App. 2004).

⁹⁹ *Id.* at 316.

that a State must recognize multiple fatherhood has no support in the history or traditions of this country.¹⁰⁰

In *Michael H.*, the mother and the respondent were married. The mother had an adulterous relationship with the petitioner father resulting in the child at issue. The respondent was listed as the father on the child's birth certificate and held the child out to the world as his daughter. However, blood tests showed that the petitioner was the child's father. For a time, the mother resided with the petitioner, who held the child out as his daughter. The mother subsequently moved and rebuffed the biological father's attempts to visit the child. The petitioner filed a filiation action to establish his paternity and right to visitation. The child filed a cross-complaint asserting that if she had more than one de facto father, then she was entitled to maintain her filial relationship with both. The mother and the respondent reconciled. The respondent intervened, and the superior court granted his motion for summary judgment against the petitioner and the child. The California Court of Appeal affirmed. The California Supreme Court denied discretionary review. The U.S. Supreme Court affirmed thus leaving the child with only one recognized father, not two. Given the age of this case it seems that the U.S. Supreme Court might take a different view some thirty years later.

Note that the Louisiana Supreme Court distinguished the *Michael H.* case in *T.D. v. M.M.M.*,¹⁰¹ discussed previously, by noting that at the time that case was decided, California did not have a statutory scheme that allowed for dual paternity while Louisiana did have such a scheme.¹⁰² In *T.D.*, the dissenting judge strongly disagreed with the majority's application of Louisiana law allowing the biological father to establish paternity and recognizing dual paternity. The dissent argued that doing so simply allowed a biological father to interfere with the father-son relationship and close bond that had been established with the child by the legal father. The dissent faulted the majority's application of the dual paternity law and the majority's permitting the biological father to intervene at such a late juncture, noting:

First and foremost, these laws protect and strengthen the marital family unit by protecting it from intrusion by biological fathers who have

¹⁰⁰ 491 U.S. 110, 130-31 (1988).

¹⁰¹ 730 So. 2d 873.

¹⁰² *Id.* at 876 n. 2.

not previously established parental relationships with their children. Second, these laws also protect children by promoting stable family relationships. Finally, these laws protect the substantial and important relationship that develops between a father and child by virtue of the father's care and nurturance of the child, despite the lack of a biological connection.¹⁰³

Thus, the dissent supported the argument that, regardless of genetics, the husband of the wife who bears the child who accepts the child as his own and actually parents that child should be the only recognized father.

Some commentators argue that recognizing untraditional families will "all but guarantee . . . new and even bizarre family structures."¹⁰⁴ Such fear of new family structures that undermine traditional family structures and values also remains deeply rooted in conservative religious views.¹⁰⁵

2. Reduction of Conflict and Best Interests of the Child

Given the proliferation of custody disputes as between just two parents, another criticism of tri-parent arrangements is that now there is apt to be more conflict between the parents which is not in the best interest of the child. The argument is that now there will be three or more parents and not just two who have to get along and work together. This potential lack of cooperation in multiple parenting is evidenced by some of the cases set out in this article which show that even with multiple parent recognition, such arrangements may inevitably end up in court. Two of the cases in this article show that litigation ensued when one parent wished to move with the child. In the New Jersey case of

¹⁰³ *Id.* at 882.

¹⁰⁴ *Sharon S. v Superior Ct.*, 31 Cal. 4th 417, 451 (2003) (Baxter, J., concurring in part and dissenting in part).

¹⁰⁵ See Dennis Leap, *Courts Say More than Two Parents OK*, TRUMPET (July 11, 2017), <https://www.thetrumpet.com/16039-courts-say-more-than-two-parents-ok>. (calling multi-parent families a "violation of the Fifth, Seventh and Tenth Commandments. It is immorality and it is law-breaking."); Patrick McGreevy & Melanie Mason, *Brown Signs Bill to Allow Children More than Two Legal Parents*, L.A. TIMES (Oct. 4, 2013), <https://perma.cc/7UWD-QJY9> (multiple parents are an "attack" on the traditional family); Deirdre Reilly, *Tri-Parenting Failing Children*, LIFEZETTE (Apr. 19, 2016), <https://www.lifezette.com/momzette/why-we-shouldnt-try-tri-parenting/> (stating that the traditional family structure is "best").

D.G. v K.S.,¹⁰⁶ the biological mother wanted to move to California and in the Minnesota case of *LaChapelle v. Mitten (In re L.M.K.O.)*,¹⁰⁷ the biological mother in fact moved with the child to Michigan. In the New Jersey case, the court held that the parent could not move, and in the Minnesota case the court held that the parent had to move back with the child.¹⁰⁸

3. *Concerns About Abuse and Over-Extension*

Some fear that allowing multiple parents to share in traditional parental rights will open the door for cults and their ilk to “claim” children for the cult. One arguably conceivable – but unlikely – “unintended consequence” of allowing an unlimited number of parents to be listed on birth certificates is that groups such as spiritual sects or cults might seek to register multiple parents as a way of asserting improper control over the children.¹⁰⁹ “If a child can have three parents,” Aston wrote, “why not four or six or a dozen? What about all the adults in a commune or a religious organization or sect?”¹¹⁰

4. *Lack of Stability for the Child*

Other people argue that allowing a child to have more than two legal parents will lead the child to feel unstable and confused.¹¹¹ This argument flies directly in the face of the counter-argument that the more parents a child has, the greater the stability. Yet the criticism of tri-parenting not being in the child’s best interests persists. “The ones who are going to pay the price [of California’s multi-parent bill] are not the activists, but it’s going to be children, who will see greater conflict and indecision over matters involving their well-being.”¹¹²

¹⁰⁶ 133 A.3d 703 (N.J. Super. Ct. 2015).

¹⁰⁷ 607 N.W.2d 151 (Minn. Ct. App. 2000).

¹⁰⁸ See Reilly, *supra* note 105, for an article that is very critical of the New Jersey tri-parenting arrangement.

¹⁰⁹ Gerber & Lindner, *supra* note 89, at 261.

¹¹⁰ Gudrun Schultz, *Ontario Court Rules Five-Year Old Has Three Legal Parents – Father, Mother, Lesbian Partner*, LIFESITENEWS.COM (Jan. 3, 2007), <https://www.lifesitenews.com/news/ontario-court-rules-five-year-old-has-three-legal-parents-father-mother-les>.

¹¹¹ *Id.*

¹¹² McGreevy & Mason, *supra* note 105.

IV. Conclusion

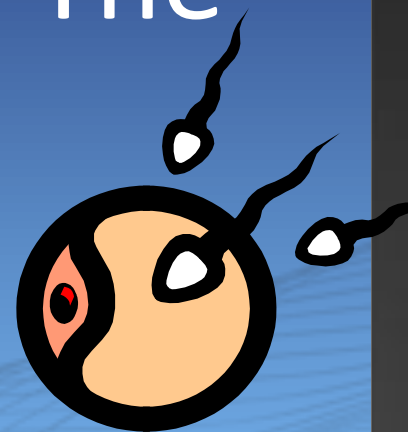
The recent evolution and growth of assisted reproductive technology is enabling more tri-parent cases to come into existence, primarily by design but also by default. Focusing solely on a child-centric approach, isn't it the case that, so long as they get along and cooperate, the more legal parents for a child the merrier? When a child has three, or even four, legal parents, there is then one more parent from which to inherit or to receive military benefits or social security benefits. It leaves one more parent to care for the child in the event of incapacity or unavailability of the others. It means yet another parent who can contribute to the child's overall welfare including education and extracurricular activities. Provided that all three (or more) parents can put the child's interest first, aren't there greater resources that inure to the child's benefit? And moreover, whether by default or design, isn't this just the inevitable future of some families that the law, whether by statute or common law, will be forced to address and embrace?

	Adoption	Joint Custody
Make med decisions for child	Yes	Yes
Make education decisions for child	Yes	Yes
Make religious decisions about child	Yes	Yes
Have physical custody of child	Yes	Yes
Enroll child in activities	Yes	Yes
Have name on child's birth certificate	Yes	<i>Depends – for same-sex females who filled out vital records form then yes.</i>
Put child on private insurance	Yes	<i>DEPENDS on the insurance</i>
Be on equal footing with spouse for custody in event of divorce/separation	Yes	Maybe, only if the marriage/divorce is/are recognized and may depend on length of the relationship with child
Get FMLA leave relating to child's birth/illness	Yes	<i>YES if acting "in loco parentis"</i>
Claim the child as a dependent on taxes	Yes	<i>NO, if both partners attempt to claim. Not clear, if the custodial parent waives and other partner attempts to claim child as a dependent—check with tax attorney or accountant</i>
Biological parents' rights are terminated	Yes for regular adoption Not always for second-parent/step-parent adoption	No—not by the custody order itself but often by donor consents or other means
Order can be modified by request of parties	No (not any more so than for a biological child)	Yes
Child inherits if that parent dies	Yes	No, but can arrange for child to inherit through <u>estate attorney</u>
Child gets Social Security Benefits if that parent dies	Yes	<i>NO</i>
One parent can get child support from other in case of divorce.	Yes	<i>NO, but court will likely uphold a contract where a party agrees to support upon separation</i>



Challenges & Controversies in Treating LGBTQ Patients – The Legal Perspective

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Learning Objectives:

- Have an understanding of the legal issues that arise for LGBTQ couple's pursuing fertility treatment.
- Be able to examine their own clinic practices and determine what changes need to be made (to clinic documents) to make their clinic a safer and supportive environment for LGBTQ patients.
- Evaluate the ethical issues associated with having client's sign clinic documents with or without the recommendation of having legal counsel.



Disclosures:

- Nothing to disclose.



Audience Response Question 1 - Please indicate if you are:

- a. A medical provider or clinic
- b. A mental health provider
- c. An attorney
- d. Other



Audience Response Questions 2 & 3 -

How many of you serve or have served LGBTQ Clients?

How many of you have modified your consent and release forms for LGBTQ patients?



Examples of LGBT Patients using ART:

- Same-sex male couple/individual using a gestational carrier or true surrogate
- Same-sex female couple/individual doing artificial insemination or embryo transfer
- Same-sex female couple where one plans to be genetic mom (contributing her egg to be combined with donor sperm) and the other will be gestational mom (carrying the transferred embryo)
- Transgender female (biologically male) contributing the sperm and undergoing embryo formation and transfer with her partner
- Transgender male (biologically female) serving as gestational carrier for a couple or desiring to carry a pregnancy himself and/or with his partner



The Hayman Family: Lesbian Family Earn Right to Have Children's Names on Birth Certificates with Order of Parentage in Virginia





What else? Female couple w/carrier or Donor Egg/Embryo





Examples of Clinic Documents that LGBTQ Patients confront:

- Intake forms and other documents that reference “mother” and “father” and “husband” and “wife” versus “parent” and “parent.”
- Lesbian mother contributing her egg given “Donor” info and release form
- Lesbian mother gestating the child given “Gestational Carrier” info and release form
- Same-sex male couple given info and release forms written for hetero couple using a gestational carrier or surrogate
- Documents replete with references to “him” and “her” which need to be gender neutral



**WE
ARE
ALL
THE
SAME
INSIDE**

**I'm gay
I'm lesbian
I am bisexual
I am transgender
I am like you
I'm human**



Examples of Clinic Documents Confronted By Gestational Mom & Genetic Mom

- Yet they prevail despite heavily red-lined, redrafted, rewritten by hand
- Not “Donation” but “Retrieval”
- Not “Donor” but “Genetic Mother”
- Not “Intended Parent” or “Gestational Carrier” but “Gestational Mother”
- So “OVUM DONATION – DONOR CONSENT FORM” changed to:
 - “OVUM RETRIEVAL –GENETIC MOTHER CONSENT FORM”





They WILL PREVAIL despite non-user friendly documents.



I HEAR HE'S IVF. LIKE WAV WANTED.



All Donor Release Language For Genetic Mom and Gestational Mom Must Be Struck

STRIKE OUT:

I understand that. Recipients sign a consent form and agree not to try, under any circumstances, to contact me, and are made aware that absolutely no identifying information concerning me will be given to them in the course of the Program. I understand Recipients will, however, receive a summary of my non-identifying medical, genetic, and social history if a pregnancy is established with the eggs I have donated. I acknowledge that I will not receive any identifying information regarding Recipients in the course of the Program.



ALL FORMS REVISED - EXAMPLES:

- So “Ovum Donation – Recipient Consent Form” becomes
 - “GENETIC AND GESTATIONAL MOTHER CONSENT FORM”
- And “Consent to Act as a Gestational Carrier” becomes
 - “CONSENT TO ACT AS A GESTATIONAL MOTHER”
- And “Consent to Utilize a Gestational Carrier” becomes
 - “CONSENT TO SERVE AS AND UTILIZE A GESTATIONAL MOTHER”



Problem Cases:

- K.M. v E.G. (Cal. 2005)
- D.M.T. v T.M.H. (Fla. 2013)
- Both cases involved moms who split and gestational mom claimed that genetic mom was a donor not a parent, in both cases the genetic moms were given donor consents to sign





Gestational Mom & Genetic Mom

- Must Have a Non-Donor Agreement so that Genetic Mom is clearly not a donor and is treated as an intended legal parent and so that Gestational Mom is not a gestational carrier and is treated as an equal intended legal parent
- New clinic documents should be created for these increasingly frequent situations where both moms want to be part of the creation process
- All the forms should be sent to legal counsel to ensure consistent with Non-Donor Agreement as between the parties.





And the issues are not unique to the US:



The ruling by Sir James Munby, President of the Family Division, *In the Matter of the Human Fertilisation and Embryology Act 2008 (Case V) [2016] EWHC 2356 (Fam)* is the fifteenth in a series of fertility treatment cases 'gone wrong'. The parents in Case V were referred by the clinic to specialist fertility lawyer Louisa Ghevaert at Michelmores LLP.

In Case V, the President granted another Declaration of Parentage to a woman because of a missing patient consent form at a UK fertility clinic licensed by the Human Fertilisation and Embryology Authority (HFEA). Depressingly, Case V arose because of mismanagement of legal aspects governing consent to fertility treatment and legal parenthood at UK fertility clinics.



Case V continued

- Case V came about because the HFEA Consent Form PP ("your consent to being the legal parent") was signed at the appropriate time but no signed HFEA Form WP ("your consent to your partner being the legal parent") could be found on the clinic's records.
- Case V focused on securing a declaration of parentage for the applicant and the financial and emotional costs of resolving the situation, which was not of the couple's making. The couple acknowledged clinic staff were *"professional, kind and organized, affording a feeling of comfort"* and treated them with *"respect and courtesy"*.
- The President highlighted the difficulties suffered by the couple as a result of the legal problems they experienced recounting the woman's evidence *"knowing I did not have the legal rights to be Z's parent was completely overwhelming and rocked me to the core"*. He went on to say *"For the first time ever in her life she suffered depression. When addressing me in court she described the information as 'truly heartbreaking' and repeated how she had been 'rocked to my core'"*.





State of the law since *Obergefell v. Hodges*

- ALL married couples are entitled to have their marriage recognized.
- However LGBTQ couples still are encountering issues in being recognized as legitimate parents— especially with the marital presumption NOT applying to whether their legal parentage is valid – by way of example:
 - *Stankevich v. Milliron* (Mich. App. 2015) (where married and had child with each other by agreement – yet upon split - bio mom tried to say non-bio mom not a parent)
 - *Ex parte E.L. (In re: E.L. v V.L.)* (Supreme Court of Alabama 2015) (bio mom tried to invalidate Georgia step-parent adoption by non-bio mom in Alabama), on appeal US Supreme Court held ALL adoption orders must be given full faith & credit by other states. See *V.L. v. E.L.*, 136 S. Ct. 1017 (2016). Does NOT apply to birth certificates. Same-sex couples need an Order.



Why Same-Sex Couples Cannot Rely on Birth Certificates Alone

- A birth certificate is a document issued through an administrative process and is NOT a court order.
- A birth certificate is based on the relationship between spouses only and NOT the relationship between parent and child.
- Parentage solely dependent on a birth certificate can be challenged in a divorce—and there are several cases out there where that has happened.
- Parentage based solely on a birth certificate might not be recognized by all judges/courts.
- The birth certificate administrative process does not ensure that sperm donor rights are terminated by court order.
- Parentage based solely on a birth certificate generally is not sufficient to adequately give a basis for passing an inheritance by interstate laws, for the child to qualify for social security benefits and for claiming the child as a dependent under pertinent tax codes.



All Same-Sex Couples Should Have a Court Order Declaring Parentage and Consult Legal Counsel

- Can be done by:
 - Pre-Birth Order
 - Step-Parent or Second Parent Adoption
 - Order of Parentage
 - Order of Parentage along with Step-Parent or Second Parent Adoption
 - KEY:
 - You must refer your patients to legal counsel – have signed documents
 - Request or mandate legal clearance letters before proceeding
 - Ethically advise couples of the right to separate legal counsel



"And if you don't have an attorney, we've got millions of them."



Any LGBTQ Patient Using Donor Gametes – Clinic Release is NOT enough

- All patients using donors – even anonymous – should have a separate donor agreement directly as between the donor and the donee(s) AND as between the recipients!!
- Why?
 - Clinic document is not as between the parties but only with the clinic – so no privity of contract as between the parties – does not BIND the parties.
 - Clinic document does not address ALL of the issues as between the spouses/partners and/or donors/donees (future contact, representations regarding health/background (without direct representation by the donor – clinic now is caught in the middle and being sued for donor's failure to disclose), registering with registry, disposition upon divorce (clinic doc is NOT binding), etc.)
 - Again – **ethically the clinic must advise as to the parties having counsel and agreements separate from the clinic.**



With Same-Sex Marriage – Comes Same-Sex Divorce



- More and more couples are arguing over ownership – especially of gametes and embryos
- Example: Partner who contributed the egg now wants to implant the embryo into herself; but ex jointly purchased the sperm with her
- Absent a pre-nuptial or post-nuptial property settlement agreement and donor release – this is joint property (or joint ownership – no different than heterosexual couple) – clinic cannot legally do the transfer
- If clinics insist on a property disposition agreement as between the parties at the time of embryo creation and storage – that will resolve these disputes
- Clinic can avoid time and expense caught up in legalities



More recommendations/solutions:

- Ownership of sperm or eggs should be held ideally in the name of one owner with that owner having full ownership and control.
- If the sperm and egg remain stored separately – with embryos formed later, ownership can be kept a bit cleaner with a sole owner
- Where joint ownership occurs – especially with embryos - insist on the parties having a separate disposition agreement as between the two of them. An informed consent document or even disposition agreement with the clinic is not sufficient.
- State laws on disposition between the parties can vary – so best to farm out to the attorneys to handle.



Donated Embryos:



I'm their real child, and you're just
a frozen embryo thingy they
bought from some laboratory."

by William Hamilton



Conclusions:

- All clinic documents (including intake forms) should be modified to be used neutrally by all persons including LGBTQ individuals and couples
- Some clinic documents may need to be specifically modified or created for LGBTQ situations (e.g., the genetic mom/gestational mom couple)
- Clinics need to recognize that – despite the US Supreme Court decision in Obergerfell – LGBTQ families are NOT legally secure especially with regard to securing parentage



Conclusions (cont):

- LGBTQ patients (and actually ALL patients) should be advised to seek legal counsel; Clinics should ensure that the right legal documents are in place before treatment and that legal parentage has been mapped out in advance (clinic can require legal letter). Clinic should indicate right for each to have separate legal counsel.
- Clinic – to minimize liability – should require agreements be put into place as between donors and donees and as between recipients/patients.
- Even where anonymous donation – easy to facilitate.



VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

Case No:

**Re: The Step-Parent Adoption of
 An Infant, by Heather Lynn Bauby and Kathy Lynn Hoverman**

BRIEF IN SUPPORT OF PETITION FOR STEP-PARENT ADOPTION

Petitioners Heather Lynn Bauby and Kathy Lynn Hoverman, by counsel, hereby file this Brief in support of their Petition to this Court for Kathy Lynn Hoverman, the non-biological mother, to be granted her step-parent adoption of

FACTS

As set out in the Petition, Heather Lynn Bauby and Kathy Lynn Hoverman were married in Maryland on December 10, 2013. Petitioners conceived their daughter, through assisted reproductive technology using Heather Lynn Bauby's eggs and an anonymous donor's sperm. On , at Henrico Doctors Hospital in Henrico, Virginia, Heather Lynn Bauby gave birth to a baby girl named . Kathy Lynn Hoverman, Bauby's wife, is also listed on the birth certificate as the mother of the child. However, Hoverman desires to adopt her child with Bauby because the birth certificate was issued pursuant to an administrative procedure, which currently has no solid basis in Virginia statutory law or case law, and which can be subject to future challenges. However, an adoption Order entered by this Court would secure full parental rights for Hoverman as to her daughter.

ARGUMENT

First, Virginia's current statutory scheme does not clearly address the rights of same-sex couples who have had a child using assisted conception. The statutes regarding assisted conception only refer to couples as "husband" and "wife;" there is no language regarding "wife"

and “wife.” Consequently, a narrow reading of Virginia law could potentially deny Hoverman parental rights even though she is listed as the child’s mother on the birth certificate.

Second, an adoption is necessary because it would be entitled to full faith and credit elsewhere, which would ensure Hoverman’s parental rights across all fifty states and internationally, as well as the child’s rights. Given the recent examples from other states where courts have repeatedly questioned or undermined the legal rights of parents who are or were a part of a same-sex couple, an adoption order is a necessary step for the Petitioners to protect their family against future legal uncertainty.

I. Virginia’s Statutory Scheme is Vague Concerning Same-Sex Couples Who Use Assisted Conception to Have a Child.

According to the Virginia Department of Vital Records form VS-22A, same sex-female spouses may both acknowledge parentage of a child when one of the spouses is the gestational mother of the child (see copy of form attached as Exhibit A). The Petitioners utilized this form following the birth of _____ so that they would both be listed as her parents on her birth certificate. The form states that, “Pursuant to Virginia Code 32.1-261(A)(2), this statement is to acknowledge the parentage of the child described herein.” However, the Virginia Code section cited on the form does not refer to same sex female spouses; instead, it reads, “The State Registrar shall establish a new certificate of birth for a person born in the Commonwealth upon receipt of the following...A request that a new certificate be established and such evidence as may be required by regulation of the Board proving that such person has been legitimated or that a court of the Commonwealth has, by final order, determined the **paternity** of such person.”

Reading the statute narrowly, a court can readily find that it does not actually apply to a same-sex female couple, such as the Petitioners. Although the Department of Vital Records

(under the current Virginia administration) has favored a broad interpretation of the law that supports the rights of LGBT individuals following the statewide recognition of marriage equality after the decision in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), *cert. denied sub nom. Rainey v. Bostic*, 135 S. Ct. 286 (2014), Virginia's parentage statutes have not been revised to reflect this progress.

Additionally, under the language of Virginia's assisted reproductive technology statute, Hoverman's parental role is similarly vague. That code section defines "Intended parents" as "man and woman, married to each other..." Va. Code § 20-156. Under this definition, Hoverman could not be considered an intended parent of a child born from assisted reproductive technology, even though she is listed on the birth certificate, because she is not a man or married to a man. Furthermore, the subsequent section of the assisted reproductive technology statute dealing with, "Parentage of a child resulting from assisted conception" only references a gestational mother, the husband of the gestational mother, intended parents, and donors, who are not parents unless a donor is the husband of the gestational mother. Va. Code § 20-158. Again, a narrow reading of these statutory sections would not recognize Hoverman as _____'s parent, since she is not her genetic or gestational mother, and is not the husband of the gestational mother.

Finally, Virginia's parentage statute at Va. Code § 20-49.1 provides no mechanism by which Hoverman can establish legal parentage over _____ except via proof of a lawful adoption. Va. Code § 20-49.1(C). Thus, until the language of Virginia laws are revised to reflect the LGBT inclusiveness currently recognized by the Virginia Attorney General's office and the Department of Vital Records, married same-sex couples must continue to obtain adoption orders to ensure permanent, secure parentage for both spouses. Unlike a birth certificate, which is only a

document issued via an administrative process, an adoption is via a court order that cannot be subject to “attack in any proceedings, collateral or direct, for any reason, including but not limited to fraud, duress, failure to give any required notice, failure of any procedural requirement, or lack of jurisdiction over any person, and such order shall be final for all purposes.” Va. Code Ann. § 63.2-1216. Granting Hoverman the right to a step-parent adoption would allow her all the “rights and privileges” of a parent who had a child “born in lawful wedlock.” Va. Code Ann. § 63.2-1215 (2016).

II. A Step-Parent Adoption Will Ensure Petitioners Rights as Parents in Every State.

To secure Hoverman’s parentage under Virginia law, an adoption order also is necessary because an order (but not a birth certificate) is entitled to full faith and credit elsewhere, which would ensure Hoverman’s parental rights across all fifty states and even internationally. Given recent attempts in other states to undermine the parental rights of same-sex couples, such a concern is unfortunately quite valid for the Petitioners.

Recently, a judge in Knox County, Tennessee, ruled in a same-sex divorce case that the non-biological mother had no parental rights over the child because the statute specifically defined parents as “husband” and “wife.” See Jamie Satterfield, *Parenting Rights in Same-Sex Divorces Headed to a Tennessee Appellate Court*, Knoxville News Sentinel (June 29, 2016) (attached as Exhibit B). The couple, Erica and Sabrina Witt, married in Washington, D.C. and had their child through artificial insemination. Using an anonymous sperm donor and Sabrina’s eggs, Sabrina gave birth to a baby girl. The couple was going through divorce proceedings and having trouble determining the custody of their child because of the vague statutory language in Tennessee. Similar to the statutory language in Virginia, the parents of a child created through assisted conception are defined as “husband” and “wife,” or “man” and “woman.” In the Witt

case, as both the gestational and biological mother, Sabrina is considered the mother but Erica is technically considered to have no relationship to the child even though she is married to Sabrina and she has stood *in loco parentis* to the child since the child's birth. The Judge agreed with the interpretation that the statute should be read narrowly and determined that Erica Witt has no parental rights to the child as she was not the biological mother and she never adopted the child. This decision leaves Erica Witt without parental rights, meaning she cannot make medical or education decisions on behalf of her child.

In Michigan, the state Court of Appeals considered a case with very similar facts in 2015 (see *Stankevich v. Milliron* (Mich. App., 2015), attached as Exhibit C). In that case, the parties had married in Canada in 2007, and one of the mothers gave birth to a child conceived through assisted reproductive technology. Shortly thereafter, after the parties separated, the non-biological mother attempted to seek an order affirming her parentage and addressing custody and visitation. The biological mother, however, filed a motion for summary judgment stating that the non-biological mother did not have standing to bring the action, because she was not a parent. After a series of appeals and remands, and the intervening decision of the United States Supreme Court in *Obergefell v. Hodges*, the Michigan Court of Appeals eventually concluded that the non-biological mother had standing to argue equitable parentage. However, that case still demonstrates the uncertainty and potential protracted litigation that same-sex couples may face in the event of separation without an order of lawful adoption.

Another recent Alabama case demonstrates the importance of court-issued adoption orders for same-sex parents. In *Ex parte E.L. (In re: E.L. v V.L.)*, 1140595 (Supreme Court of Alabama 2015) (attached as Exhibit D), a biological mother attempted to void her same-sex partner's second-parent adoption in Alabama, which had been granted by Georgia. The

biological mother argued that Alabama should not give full faith and credit to the Georgia adoption order because, she claimed, the Georgia court lacked the subject-matter jurisdiction to enter the order, and giving full faith and credit to the order would be contrary to Alabama's public policy. The Supreme Court of Alabama agreed that Georgia lacked subject-matter jurisdiction, and declined to give full faith and credit to the adoption order. The non-biological mother then appealed to the United States Supreme Court, which reversed, thus creating the national precedent that same-sex adoption orders must be given full faith and credit across all fifty states (see *V.L. v. E.L.*, 136 S. Ct. 1017 (2016), attached as Exhibit E). Fortunately, this case now establishes that same-sex adoption orders must be given full faith and credit throughout the United States; however, there is no such precedent for birth certificates. Thus, an adoption order remains the only way by which non-biological parents can safely and permanently protect themselves against future challenges to their parental status.

Moreover, the National Center for Lesbian Rights (NCLR) has issued a strong recommendation that, "all non-biological parents get an adoption or judgment from a court recognizing that they are a legal parent, even if they are married and even if they are listed as a parent on the birth certificate." See full statement attached as Exhibit F. The statement from the NCLR goes on to note that, "Being married to a birth parent does not automatically mean your parental rights will be fully respected if they are ever challenged. There is no way to guarantee that your parental rights will be respected by a court unless you have an adoption or court judgment." The recommendation from the NCLR reflects the current legal state of the rights of non-biological parents in same-sex relationships, which is to say, still uncertain and evolving.

Finally, without an adoption order, this child may not receive Kathy Lynn Hoverman's social security benefits or inherit under current intestate laws, and Hoverman may not be allowed

to claim the child on her taxes as a dependent. These are just some of the other areas of the law still in flux.

These recent decisions, along with the strong language adopted by the NCLR, and the fact that the child cannot be denied the benefits of a parent secured by court order, demonstrate why Hoverman must be allowed to adopt her child and secure full parental rights. Without an adoption, a judge in Virginia or elsewhere could potentially deny the parental rights of Hoverman, the non-biological mother, even though she is listed on _____'s birth certificate, because the statutory language only addresses the rights of opposite-sex couples. Therefore, it is crucial that Hoverman be allowed to adopt her daughter, through a step-parent adoption, as that would give her full legal and parental rights and will secure the child's full rights.

CONCLUSION

Wherefore, given the foregoing, Petitioners respectfully request this Court to allow the step-parent adoption of _____ by Kathy Lynn Hoverman, even though Hoverman is listed as the child's mother on her birth certificate. The parties' further request that a hearing regarding the relevance of a step-parent adoption be waived or not deemed required especially given the filing of this comprehensive brief and the fact that this is uncontested and consensual matter.

Respectfully Submitted,
HEATHER LYNN BAUBY
KATHY LYNN HOVERMAN

By: 

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Kati Kitts Dea, Esquire (VSB No. 86361)
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Counsel for Petitioners

ACKNOWLEDGEMENT OF PARENTAGE – SAME-SEX MARRIAGE - ONE SPOUSE IS GESTATIONAL MOTHER

VIRGINIA DEPARTMENT OF HEALTH – DIVISION OF VITAL RECORDS

P. O. BOX 1000, RICHMOND VIRGINIA 23218

Pursuant Virginia Code 32.1-261 (A) (2) this statement is to acknowledge the parentage of the child described herein. To be completed by couples who were legally married prior to the birth of their child. There is a \$10.00 administrative fee to establish the new birth certificate.

Part I – ChildFull Name at Birth: _____
(First) (Middle) (Last) (Suffix)

Sex/Gender: _____ Date of Birth: _____

Place of Birth: _____ Birth Certificate Number (if known): _____

Part II – GESTATIONAL MOTHER OF THE CHILD – PARENT ONEFull Maiden Name: _____
(First) (Middle) (Last) (Suffix)Present Name: _____
(First) (Middle) (Last) (Suffix)

Date of Birth: _____ Place of Birth (State or Foreign Country): _____

Social Security Number: _____ Race: _____ Highest Level of Education Completed: _____

PART III – PARENT TWOFull Maiden Name: _____
(First) (Middle) (Last) (Suffix)Present Name: _____
(First) (Middle) (Last) (Suffix)

Date of Birth: _____ Place of Birth (State or Foreign Country): _____

Social Security Number: _____ Race: _____ Highest Level of Education Completed: _____

PART IV – PARENTS MARRIAGE (You must complete this section and enclose a certified copy of your marriage record)Place of Marriage: _____ Date of Marriage: _____
(City/County and State)**PART V – PARENTS' ACKNOWLEDGEMENT**

We, being duly sworn, affirm that we are the parents of the child named above who was conceived through assisted conception, and we request that Parent Two Information be shown on this child's birth certificate.

Signature of Parent One: _____ Signature of Parent Two: _____

Address of Parent One: _____ Address of Parent Two: _____

Subscribed and sworn before me on: _____ Subscribed and sworn before me on: _____

Notary's signature: _____ Notary's signature: _____

Notary's address: _____ Notary's address: _____

My Commission expires: _____ My Commission expires: _____

EXHIBIT**A**

tabbles

WATCHFUL EYE

Parenting rights in same-sex divorces headed to a Tennessee appellate court



Erica Witt reacts, alongside her attorney Virginia Schwamm, as she is denied same-sex parenting rights during a Knox County Circuit Court hearing Friday June 24, 2016. Judge Greg McMillan opined that because she is a woman who legally married a woman, state law does not confer to her any parenting rights. (AMY SMOTHERMAN BURGESS/NEWS SENTINEL)

By Jamie Satterfield of the Knoxville News Sentinel

June 24, 2016

If Erica Witt were a man, she would have just as much right to a daughter conceived via artificial insemination as her spouse.



But in the first ruling of its kind in Tennessee, a Knox County judge on Friday opined that because she is a woman who legally married a woman, state law does not confer to her the power of decision-making over the child or the obligation to provide financial support for the girl now that the same-sex couple is divorcing.

"I believe this is a situation where (Erica Witt) has no biological relationship with this child, has no contractual relationship with this child," 4th Circuit Court Judge Greg McMillan ruled.

Erica Witt and Sabrina Witt legally wed in Washington, D.C., in April 2014, bought a home in Knoxville and decided to have a child via artificial insemination from an anonymous donor. Sabrina Witt bore a baby girl as a result in January 2015. Because Tennessee did not then recognize same-sex marriage as legal, Erica Witt's name was not placed on the baby's birth certificate.

In February, Sabrina Witt filed for divorce. Her attorney, John Harber, contended the only law on Tennessee's books addressing parenting rights in the case of artificial insemination — enacted in 1977 — makes clear the law applies only to husbands.

"That terminology is not interchangeable," Harber argued at a hearing Friday.

Tennessee still doesn't have a law on the books officially recognizing same-sex marriage but is essentially under a mandate to do so due to a U.S. Supreme Court decision last year recognizing the rights of same-sex couples to marry. That ruling did not address divorce or parental rights in a divorce in which neither same-sex partner legally adopted the child they call their own.

Erica Witt's attorney, Virginia Schwamm, contends the same reasoning used by the nation's high court in marriage applies in divorce and custody matters.

"The argument that marriage may only consist of a 'husband' and a 'wife' has been held to be unconstitutional," Schwamm said. " (Tennessee marriage certificates) still (indicate) male and female, but surely that no longer applies. Just because the statute reads man and woman, this court can interpret the statute in a manner that makes it constitutional."

Harber disagreed.

"That terminology is not interchangeable," he said. "What we're asking the court to do today is interpret (the artificial insemination) statute as it is. Under this statute, we do not believe (Erica Witt) would qualify as a parent."

Schwamm called the language of husband and wife outdated and urged McMillan to simply update it via his ruling, just as court clerks' offices across the state are now revamping all manner of domestic forms, from marriage certificates to divorce petitions, to accommodate same-sex couples.

"There has been a commitment on the part of (Erica Witt) to raise this child, to be there for this child," Schwamm said. "The paramount consideration for the courts is the best interest of the child."

But McMillan said it was not up to the courts to enact "social policy" via legal rulings and a strict reading of the artificial insemination law tied his hands in this case.

"I believe as a trial court I am not to plow new ground, but to apply precedent and the law," McMillan said.

He is allowing Schwamm to appeal, putting the divorce action on hold pending a decision by the Tennessee Court of Appeals on whether to hear the issue.

"Given the novelty of this issue, the court thinks it appropriate to see if the appellate courts want to address this," he said.

McMillan also opined his ruling does not bar Erica Witt from seeking visitation with the child, likening her to a stepparent.

Erica Witt left the courtroom in tears. Sabrina Witt did not attend.

Schwamm said Erica Witt has been "extremely involved" with raising the girl and is heartbroken at Friday's ruling.

Even if McMillan eventually awards Erica Witt visitation rights, his refusal to recognize her as a parent means she will have no say in issues including the child's education and medical needs. The decision means she is under no obligation to pay child support either.

**About Jamie Satterfield**

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Find this article at:

<http://www.knoxnews.com/news/crime-courts/parenting-rights-in-same-sex-divorces-headed-to-a-tennessee-appellate-court-36046f02-b742-54df-e053--384279061.html>

☐ Check the box to include the list of links referenced in the article.

STATE OF MICHIGAN
COURT OF APPEALS

JENNIFER STANKEVICH, a/k/a JENNIFER
MILLIRON,

Plaintiff-Appellant,

v

LEANNE MILLIRON,

Defendant-Appellee.

FOR PUBLICATION
November 19, 2015
9:00 a.m.

No. 310710
Dickinson Circuit Court
LC No. 12-016939-DP

ON REMAND

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendant's motion for summary disposition for failing to state a claim under MCR 2.116(C)(8). Pursuant to the dictates of the United States Supreme Court in *Obergefell v Hodges*, ___ US ___, 135 S Ct 2584; 192 L Ed 2d 609 (2015), we remand this matter for proceedings consistent with this opinion.

I. BACKGROUND

In our October 17, 2013 opinion in this matter, we summarized the factual background of the case:

The parties entered into a same-sex marriage in Canada in July 2007. Before that date, defendant had been artificially inseminated, and later gave birth to a child. Defendant is the biological mother of the child.

The parties' [sic] separated in March 2009. While they initially agreed to a visitation schedule, they subsequently found that they could not agree. Thus, plaintiff filed a verified complaint, asserting that she fully participated in the care and rearing of the minor child. She requested relief from the trial court, which included an order dissolving the marriage, an order affirming that she is the parent of the child, and orders regarding custody, parenting time, and child support.

Defendant, however, filed a motion for summary disposition pursuant to MCR 2.116(C)(8). She asserted that plaintiff did not have standing to petition for



custody of the child. The trial court granted defendant's motion. Plaintiff now appeals. [*Stankevich v Milliron*, unpublished opinion per curiam of the Court of Appeals, issued October 17, 2013 (Docket No. 310710), p 1, vacated and remanded 498 Mich 877 (2015).]

In our previous opinion, we upheld the grant of summary disposition to defendant because plaintiff lacked standing to bring this action. *Stankevich*, unpub op at 1. We noted that the Child Custody Act (CCA) defines "parent" as the "natural or adoptive parent of a child." *Id.* at 2, citing MCL 722.22(h).¹ Plaintiff is not a parent under this definition because she is not an adoptive parent and because she is not related to the child by blood. *Id.*, citing *Random House Webster's College Dictionary* (2005) (defining "natural" as, in part, "related by blood rather than by adoption: *one's natural parents*."). Likewise, we rejected plaintiff's request to apply the equitable parent doctrine that was adopted in *Atkinson v Atkinson*, 160 Mich App 601, 608-609; 408 NW2d 516 (1987). *Stankevich*, unpub op at 3-5. The basis of our conclusion was that applying the doctrine in this case would be contrary to *Van v Zahorik*, 460 Mich 320, 330-331; 597 NW2d 15 (1999), in which the Michigan Supreme Court declined to extend the equitable parent doctrine outside the context of marriage, because recognizing plaintiff's same-sex union as a marriage under the equitable parent doctrine would violate the constitutional and statutory provisions defining marriage. *Stankevich*, unpub op at 3-5.

On November 25, 2013, plaintiff filed an application for leave to appeal with the Michigan Supreme Court. In light of the pending appeals from the decision in *DeBoer v Snyder*, 973 F Supp 2d 757 (ED Mich, 2014), rev'd 772 F3d 388 (CA 6, 2014), rev'd sub nom *Obergefell*, 135 S Ct 2584, on April 25, 2014, our Supreme Court entered an order holding the application in the instant matter in abeyance. *Stankevich v Milliron*, ___ Mich ___; 844 NW2d 724 (2014).

With the United States Supreme Court's decision in *Obergefell*, on September 11, 2015, the Michigan Supreme Court vacated our judgment in this case and remanded it to us for reconsideration. *Stankevich v Milliron*, 498 Mich 877; 868 NW2d 907 (2015).

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

We review the grant of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint," and "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* at 119. Furthermore, the motion only should be granted when the claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* (quotation marks and citation omitted).

¹ MCL 722.22(h) was subsequently amended by 2015 PA 51, effective September 7, 2015. The definition of "parent" remains the same, although it is now codified under MCL 722.22(i).

“Whether a party has legal standing to assert a claim constitutes a question of law that we review de novo.” *Heltzel v Heltzel*, 248 Mich App 1, 28; 638 NW2d 123 (2001).

B. ANALYSIS

Because of the United States Supreme Court’s opinion in *Obergefell*, plaintiff has standing under the equitable parent doctrine since Michigan now is required to recognize the parties’ same-sex marriage, and plaintiff’s complaint alleges facts that, if proven, are sufficient to establish equitable parenthood.²

“Generally, a party has standing if it has some real interest in the cause of action, . . . or interest in the subject matter of the controversy.” *In re Anjoski*, 283 Mich App 41, 50; 770 NW2d 1 (2009) (quotation marks and citation omitted; alteration in original). Yet, “this concept is not given such a broad application in the context of child custody disputes involving third parties, or any individual other than a parent[.]” *Id.* (quotation marks and citation omitted; alteration in original).

However, this Court adopted the equitable parent doctrine in *Atkinson*, 160 Mich App at 608-609, holding:

[W]e adopt the do[c]trine of equitable parent and find that a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.

This Court stated that, given its recognition that “a person who is not the biological father of a child may be considered a parent against his will, and consequently burdened with the responsibility of the support for the child[.]” such a person, in being treated as a parent, may also seek the rights of custody or parenting time. *Id.* at 610. This Court also has applied the equitable parent doctrine in later cases. See, e.g., *York v Morofsky*, 225 Mich App 333, 335, 337; 571 NW2d 524 (1997); *Soumis v Soumis*, 218 Mich App 27, 34; 553 NW2d 619 (1996). However, as mentioned *supra*, our Supreme Court declined to extend the equitable parent doctrine outside the context of marriage in *Van*, 460 Mich at 337.

² The remaining aspects of our previous opinion are unaffected by *Obergefell* because the opinion only affected our analysis of the equitable parent doctrine. Our application of the definition of “parent” under the CCA does not run afoul of *Obergefell* because now that definition applies equally to same-sex and opposite-sex married couples. See MCL 722.22(i) (previously MCL 722.22(h)).

In our previous opinion, we concluded that the equitable parent doctrine should not be expanded to include same-sex couples, such as the parties in this case, because Michigan statutory and constitutional provisions precluded recognition of the parties' same-sex marriage, and *Van* limited the application of the equitable parent doctrine to the confines of marriage. *Stankevich*, unpub op at 3-5. However, now with *Obergefell*, Michigan is required to recognize the parties' same-sex marriage.

In *Obergefell*, 135 S Ct at 2604-2605, the United States Supreme Court held,

[T]he 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. . . .

The Supreme Court therefore held invalid state laws, including Michigan's constitutional provision defining marriage as a union between one man and one woman, Const 1963, art 1, § 25, *Obergefell*, 135 S Ct at 2593, "to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples," *id.* at 2605.

The Court also addressed "whether the Constitution requires States to recognize same-sex marriages validly performed out of State[]" and concluded that "the recognition bans inflict substantial and continuing harm on same-sex couples." *Id.* at 2607. Accordingly, the Court held that "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 2607-2608. Thus, under *Obergefell*, the holding in *Van* limiting the equitable parent doctrine to the confines of marriage is no longer a barrier to the application of that doctrine in this case, *Van*, 460 Mich at 337, and we are required to conclude that plaintiff is not barred from asserting the applicability of the equitable parent doctrine.

Plaintiff's complaint alleges that the parties in the instant matter were married in Canada in 2007 and that defendant's biological child was born during the course of that marriage. As *Obergefell*, 135 S Ct at 2604-2605, requires that same-sex couples be permitted to exercise the fundamental right to marry on the same terms and conditions as opposite-sex couples, an application of a legal doctrine excluding same-sex married couples from the doctrine of equitable parenthood goes against the dictates of *Obergefell*, which we are bound to follow.

Should it be determined by the trial court that the parties' proffered marriage was valid pursuant to Canadian, or applicable provincial, domestic relations law and other legal and contractual requirements,³ plaintiff alleges facts that afford her standing to seek the status of an

³ Unlike marriages solemnized in sister states, which are generally recognized as valid in this state, Michigan has no statute requiring the recognition of marriages celebrated in foreign nations. Nonetheless, Michigan courts recognize marriages solemnized in foreign nations as a

equitable parent. As previously discussed, the parties claim that the child was born during the course of their Canadian marriage. Plaintiff alleges that the parties entered into an agreement to conceive and raise the child with the attendant parental rights and responsibilities. Plaintiff also claims that she assisted with the artificial insemination process through which the child was conceived, that she was present at the child's birth, and that she fully participated in the care and rearing of the child until defendant prevented her from doing so. Further, plaintiff alleges that, during the parties' relationship, they shared parental responsibilities and duties equally. She asserts that she always has maintained a strong parental role that included bonding with the child, providing for the child financially, attending the child's health care appointments, making medical decisions with defendant concerning the child's care, and providing a home for the child. Further, after going their separate ways in March 2009, the parties had a parenting-time schedule for a significant period of time. Plaintiff's complaint requests an order that affirms her parental status, an order making custody and parenting time determinations, and an order of child support.

As set forth, plaintiff's allegations would establish factually her standing to file this action seeking equitable parenthood. The facts alleged in the complaint, if proven, would support the elements of the equitable parent doctrine as set forth in *Atkinson*, 160 Mich App at 608-609.

Thus, we remand this matter for an evidentiary hearing to determine whether plaintiff is entitled to be deemed an equitable parent.

III. CONCLUSION

Obergefell, 135 S Ct at 2599-2601, 2604-2605, 2607-2608, requires Michigan to recognize same-sex marriages. Therefore, we reverse the order granting summary disposition in favor of defendant and remand for an evidentiary hearing concerning the validity of the parties'

matter of comity. It is well settled that Michigan's law and public policy favor the institution of marriage, *Van*, 460 Mich at 332; *Boyce v McKenna*, 211 Mich 204, 214; 178 NW 701 (1920), and Michigan courts have long recognized the validity of marriages celebrated in foreign countries, provided that those marriages are valid in the nation of celebration and that they are not antithetical to Michigan's public policy, see, e.g., *Boyce*, 211 Mich at 215; *People v Imes*, 110 Mich 250, 251; 68 NW 157 (1896); *Hutchins v Kimmell*, 31 Mich 126, 130-131 (1875). The rule in Michigan is that the validity of a foreign marriage must be determined by reference to the domestic relations law of the country of celebration. *Hutchins*, 31 Mich at 131; see also *Noble v Noble*, 299 Mich 565, 568; 300 NW 885 (1941); *In re Osborn's Estate*, 273 Mich 589, 591; 263 NW 880 (1935); 16 Michigan Civil Jurisprudence, Marriage, § 4, p 561.

Upon remand, the trial court must determine the validity of the parties' Canadian marriage by referencing the domestic relations law of the place in which the plaintiff alleges that she was married to the defendant.

alleged Canadian marriage and the applicability of the equitable parent doctrine. We do not retain jurisdiction.

/s/ Michael J. Riordan

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly

REL@ 09/18/2015

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2015

1140595

Ex parte E.L.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS

(In re: E.L.

v.

V.L.)

(Jefferson Family Court, CS-13-719;
Court of Civil Appeals, 2130683)

PER CURIAM.



1140595

This Court granted the petition filed by E.L. seeking certiorari review of the judgment entered by the Court of Civil Appeals affirming the judgment entered by the Jefferson Family Court insofar as that judgment recognized and gave effect to an adoption decree entered by the Superior Court of Fulton County, Georgia ("the Georgia court"), approving the adoption by V.L., E.L.'s former same-sex partner, of E.L.'s biological children, S.L., N.L., and H.L. (hereinafter referred to collectively as "the children"). We reverse and remand.

I.

E.L. and V.L. were involved in a relationship from approximately 1995 through 2011. During the course of that relationship, they maintained a residence in Hoover. In December 2002 E.L. gave birth to S.L., and in November 2004 E.L. gave birth to twins, N.L. and H.L. All births were achieved through the use of assisted-reproductive technology. It is undisputed that, following the births of the children, V.L. acted as a parent to them, and, consistent with that fact, the parties eventually made the joint decision to take legal action to formalize and to protect the parental role

1140595

V.L. had undertaken. V.L. explained this decision as follows in an affidavit filed with the Jefferson Family Court after initiating this action:

"We began researching second-parent and co-parent adoptions. We had heard through friends that Fulton County, Georgia, was receptive to same-sex parents seeking such. I could not find an attorney in Birmingham that had any knowledge of such or that was very helpful. In the fall of 2006 we met with an attorney in Atlanta, Georgia, to seek legal advice. We were informed that I needed to be a resident of the state of Georgia, specifically Fulton County, for at least six (6) months to petition for adoption in Fulton County. E.L. spoke with a friend from college ... that lives in Atlanta and her friend's mother owned a house in Alpharetta. We went to Atlanta and looked over the home and spent time with [E.L.'s] friend and her family, including [the friend's] mother. [The friend's] mother ... offered up her house for rent to us. [E.L.] and I both signed a lease for the Alpharetta residence on October 1, 2006. I submitted fingerprints to the FBI which were obtained in Alpharetta on January 25, 2007, also part of the adoption process. A background check request was submitted using the Alpharetta address. On March 26, 2007, a home study was done at the address in Georgia; per my attorney this was a requirement for petitioning for adoption. Our family of five (5) was all present."

E.L. does not dispute these basic facts; however, she states in her own affidavit filed with the Jefferson Family Court that, although the parties leased the Alpharetta house, they never spent more than approximately two nights in it, instead

1140595

continuing to live at their Hoover residence and to work at their jobs in Alabama.

On April 10, 2007, V.L. filed in the Georgia court a petition to adopt the children. E.L. subsequently filed with the Georgia court a document labeled "parental consent to adoption" in which she stated that she consented to V.L.'s adopting the children and that, although she was not relinquishing or surrendering her own parental rights, she desired that the requested adoption would "have the legal result that [V.L.] and [the children] will also have a legal parent-child relationship with legal rights and responsibilities equal to mine through establishment of their legal relationship by adoption." On May 30, 2007, the Georgia court entered its final decree of adoption ("the Georgia judgment") granting V.L.'s petition and declaring that "[V.L.] shall be permitted to adopt [the children] as her children." New birth certificates were subsequently issued for the children listing V.L. as a parent.

In approximately November 2011, E.L. and V.L. ended their relationship, and, in January 2012, V.L. moved out of the house E.L. and V.L. had previously shared. On October 31,

1140595

2013, V.L. filed a petition in the Jefferson Circuit Court alleging that E.L. had denied her access to the children and had interfered with her ability to exercise her traditional and constitutional parental rights. Accordingly, she asked the court to register the Georgia judgment, to declare her legal rights pursuant to the Georgia judgment, and to award her some measure of custody of or visitation with the children. The matter was transferred to the Jefferson Family Court, and E.L. subsequently moved that court to dismiss V.L.'s petition on multiple grounds. Both parties subsequently filed additional memoranda and the above-referenced affidavits regarding E.L.'s motion to dismiss.

On April 3, 2014, the Jefferson Family Court denied E.L.'s motion to dismiss, without a hearing, and simultaneously awarded V.L. scheduled visitation with the children. On April 15, 2014, the Jefferson Family Court entered an additional order noting that all other relief requested by the parties was denied and that the court considered the case closed. E.L. promptly moved the court to alter, amend, or vacate its judgment; however, on May 1, 2014, that motion was denied by operation of law, and, on May 12,

1140595

2014, E.L. filed her notice of appeal to the Court of Civil Appeals.¹

Before the Court of Civil Appeals, E.L. argued (1) that the Jefferson Family Court lacked subject-matter jurisdiction to rule on V.L.'s petition; (2) that the Georgia court lacked subject-matter jurisdiction to enter the Georgia judgment; (3) that the Jefferson Family Court should have refused to recognize and to enforce the Georgia judgment for public-policy reasons; and (4) that the Jefferson Family Court denied her due process inasmuch as it awarded V.L. visitation rights without holding an evidentiary hearing at which E.L. could be heard. On February 27, 2015, the Court of Civil Appeals released its opinion rejecting the first three of these arguments, but holding that the Jefferson Family Court had erred by awarding V.L. visitation without conducting an evidentiary hearing. E.L. v. V.L., [Ms. 2130683, Feb. 27, 2015] ___ So. 3d ___, ___ (Ala. Civ. App. 2015). Accordingly, the judgment of the Jefferson Family Court was reversed and

¹Rule 1(B), Ala. R. Juv. P., provides that a postjudgment motion in a juvenile case is denied by operation of law if not ruled upon within 14 days of its filing unless specific steps outlined in the rule are taken to extend that period. No attempt was made to extend the 14-day period in this case.

1140595

the case remanded for the Jefferson Family Court to conduct an evidentiary hearing before deciding the visitation issue; however, the implicit finding in the judgment of the Jefferson Family Court that the Georgia judgment was valid and subject to enforcement in Alabama was upheld. See E.L. v. V.L., ____ So. 3d at ____ ("At oral argument, the parties all agreed that, in its judgment, the family court impliedly enforced the Georgia judgment by recognizing V.L.'s right to visitation as an adoptive parent of the children.").

On March 11, 2015, E.L. petitioned this Court for a writ of certiorari to review the Court of Civil Appeals' affirmance of the judgment of the Jefferson Family Court to the extent that judgment recognized and enforced the Georgia judgment. On April 15, 2015, we granted E.L.'s petition seeking certiorari review and set the briefing schedule for the parties.²

²V.L. and E.L. subsequently filed briefs in support of their positions, as did the guardian ad litem appointed to represent the children, who filed a brief urging this Court to affirm the judgment of the Court of Civil Appeals. We also granted the subsequent motion filed by the American Academy of Adoption Attorneys, Inc., and the Georgia Council of Adoption Lawyers, Inc., requesting permission to file an amicus brief based on their interest in the subject matter of this appeal, and we have received their joint brief in support of V.L. urging us to affirm the judgment of the Court of Civil

II.

The issues raised by E.L. in this appeal regarding the effect and validity Alabama courts should afford the Georgia judgment are purely issues of law. Accordingly, we review those issues de novo. Ex parte Byrom, 47 So. 3d 791, 794 (Ala. 2010). We emphasize, however, that our review of those issues does not extend to a review of the legal merits of the Georgia judgment, because we are prohibited from making any inquiry into the merits of the Georgia judgment by Art. IV, § 1, of the United States Constitution ("the full faith and credit clause").³ Pirtek USA, LLC v. Whitehead, 51 So. 3d 291, 296 (Ala. 2010). We further "note that '[t]he validity and effect of a foreign judgment, of course, are to be determined by the law of the state in which it was rendered.'" Orix Fin. Servs., Inc. v. Murphy, 9 So. 3d 1241, 1244 (Ala. 2008) (quoting Morse v. Morse, 394 So. 2d 950, 951 (Ala. 1981)).

Appeals.

³Article IV, § 1, of the United States Constitution provides, in pertinent part, that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

III.

The gravamen of E.L.'s appeal is that the Jefferson Family Court erred by recognizing and enforcing the Georgia judgment. When considering such a claim -- whether a foreign judgment should be enforced in this State -- we are guided by the principle that we generally accord the judgment of another state the same respect and credit it would receive in the rendering state. This principle stems from the full faith and credit clause and was explained as follows by Chief Justice John Marshall in Hampton v. McConnel, 16 U.S. (3 Wheat.) 234, 235 (1818):

"[T]he judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States."

The courts of this State have consistently applied the full faith and credit clause in this manner. See, e.g., Ohio Bureau of Credits, Inc. v. Steinberg, 29 Ala. App. 515, 519, 199 So. 246, 249 (1940) (stating that "the duly attested record of the judgment of a State court is entitled to such faith and credit in every court within the United States as by

1140595

law or usage it had in the State from which it is taken"), and Pirtek, 51 So. 3d at 295 (stating that "'Alabama courts are generally required to give a judgment entitled to full faith and credit at least the res judicata effect accorded in the rendering court's jurisdiction'" (quoting Menendez v. COLSA, Inc., 852 So. 2d 768, 771 (Ala. Civ. App. 2002))).

Traditionally, Alabama courts generally have applied the full faith and credit clause so as to limit their review of foreign judgments to whether the rendering court had jurisdiction to enter the judgment sought to be domesticated. This is likely because the question of a court's jurisdiction over the subject matter or parties is one of the few grounds upon which a judgment may be challenged after that judgment has become final and any available appellate remedies exhausted. See, e.g., McDonald v. Lyle, 270 Ala. 715, 718, 121 So. 2d 885, 887 (1960) ("Where it appears on the face of the record that a judgment is void, either from want of jurisdiction of the subject matter or of the defendant, it is the duty of the court, on application by a party having rights and interests immediately involved, to vacate the judgment or decree at any time subsequent to its rendition." (citing

Sweeney v. Tritsch, 151 Ala. 242, 44 So. 184 (1907), and Griffin v. Proctor, 244 Ala. 537, 14 So. 2d 116 (1943))).⁴

In this case, E.L. relies on this principle and argues that this Court should hold that the Georgia judgment is unenforceable in Alabama because, she argues, the Georgia court lacked subject-matter jurisdiction to issue the Georgia judgment based on the facts (1) that Georgia law does not provide for so-called "second parent adoptions"⁵ and (2) that V.L. was not, E.L. alleges, a bona fide resident of Georgia at the time of the adoption. However, E.L. argues in the alternative that, even if we conclude that the Georgia court was not lacking subject-matter jurisdiction when it issued the Georgia judgment, we should not enforce the Georgia judgment

⁴Of course, in certain circumstances the lack of personal jurisdiction may be waived; however subject-matter jurisdiction may never be waived. Campbell v. Taylor, 159 So. 3d 4, 11 (Ala. 2014).

⁵"A 'second parent' adoption apparently is an adoption of a child having only one living parent, in which that parent retains all of her parental rights and consents to some other person -- often her spouse, partner, or friend -- adopting the child as a 'second parent.' See Butler v. Adoption Media, LLC, 486 F. Supp. 2d 1022, 1044 (N.D. Cal. 2007) (describing 'second parent' adoption under California law)." Bates v. Bates, 317 Ga. App. 339, 340 n. 1, 730 S.E.2d 482, 483 n. 1 (2012). The Bates court further noted that "[t]he idea that Georgia law permits a 'second parent' adoption is a doubtful one." 317 Ga. App. at 341, 730 S.E.2d at 484.

1140595

because, E.L. argues, doing so would be contrary to Alabama's public policy.

In response, V.L. argues (1) that the Georgia court had subject-matter jurisdiction to issue the Georgia judgment even if Georgia law does not provide for second-parent adoptions or even if V.L. was not a bona fide resident of Georgia at the time of the adoption;⁶ (2) that the Georgia judgment should be enforced even if the Georgia court lacked subject-matter jurisdiction because, V.L. argues, Georgia Code Ann., § 19-8-18(e), bars any challenge to adoption decrees filed more than six months after the decree is entered; and (3) there is no public-policy exception to the full faith and credit clause.

Georgia Code Ann., § 9-11-60, sets forth the circumstances in which a Georgia court will not enforce one of its judgments, stating, in relevant part:

"(d) Motion to set aside. A motion to set aside may be brought to set aside a judgment based upon:

"(1) Lack of jurisdiction over the person or the subject matter;

⁶V.L. does not concede that Georgia law does not allow second-parent adoptions or that she failed to comply with the residence requirements of the Georgia adoption statutes.

"(2) Fraud, accident, or mistake or the acts of the adverse party unmixed with the negligence or fault of the movant; or

"(3) A nonamendable defect which appears upon the face of the record or pleadings. Under this paragraph, it is not sufficient that the complaint or other pleading fails to state a claim upon which relief can be granted, but the pleadings must affirmatively show no claim in fact existed.

"

"(f) Procedure; time of relief. Reasonable notice shall be afforded the parties on all motions. Motions to set aside judgments may be served by any means by which an original complaint may be legally served if it cannot be legally served as any other motion. A judgment void because of lack of jurisdiction of the person or subject matter may be attacked at any time. Motions for new trial must be brought within the time prescribed by law. In all other instances, all motions to set aside judgments shall be brought within three years from entry of the judgment complained of."

Because the current legal proceedings were initiated over six years after the Georgia judgment was entered, the only ground in § 9-11-60 upon which a Georgia court might possibly decide not to enforce the Georgia judgment is that set forth in subsection (d)(1) -- lack of jurisdiction over the person or the subject matter.⁷ It is undisputed in this case that E.L.

⁷Although E.L. suggests that V.L. committed a fraud upon the court by claiming to be a Georgia resident when she was

1140595

and V.L. willingly appeared with the children before the Georgia court, so personal jurisdiction is not disputed; thus, lack of subject-matter jurisdiction is the only possible ground a Georgia court could have for not enforcing the Georgia judgment.

However, V.L. argues that a Georgia court would enforce the Georgia judgment even if there is a lack of subject-matter jurisdiction because of the nature of the judgment -- an adoption decree -- and the fact that it was rendered over six years ago. In support of this argument, she cites § 19-8-18(e), Georgia Code Ann., which provides that "[a] decree of adoption issued pursuant to subsection (b) of this Code section shall not be subject to any judicial challenge filed more than six months after the date of entry of such decree." (Emphasis added.) In Williams v. Williams, 312 Ga. App. 47, 47-48, 717 S.E.2d 553, 553-54 (2011), the Georgia Court of

not, such a claim would entitle her to relief from the Georgia judgment only to the extent that it implicates the subject-matter jurisdiction of the Georgia court. Section 9-11-60(d)(2) provides that a judgment may be set aside for fraud only if the party seeking to set aside the judgment is free from fault, and subsection (f) provides that a judgment may be challenged on the basis of fraud only within three years of its entry. E.L. was a willing participant in any fraud, and it is undisputed that no challenge was made to the Georgia judgment for more than six years after it was entered.

1140595

Appeals held that § 19-8-18(e) barred even a jurisdictional challenge to an adoption decree if that challenge was filed outside that six-month period, notwithstanding the general rule in § 9-11-60, Georgia Code Ann., that a judgment may be challenged on jurisdictional grounds at any time:

"Notwithstanding OCGA [Official Code of Georgia Annotated] § 19-8-18(e)'s plain language, the trial court held that the Code section did not bar [the appellee's] challenge to the adoption decree, on the ground that the challenge was brought under OCGA § 9-11-60, which allows for a judgment void for lack of jurisdiction to be attacked 'at any time' through a motion to set aside. OCGA § 9-11-60(f). See generally Burch v. Dines, 267 Ga. App. 459, 461(2), 600 S.E.2d 374 (2004) (invalidity of service can give rise to lack of personal jurisdiction). But for purposes of statutory interpretation, 'a specific statute will prevail over a general statute, absent any indication of a contrary legislative intent, to resolve any inconsistency between them.' (Citation and punctuation omitted.) Marshall v. Spee-dee Cash of Ga., 292 Ga. App. 790, 791, 665 S.E.2d 888 (2008). In this case, OCGA § 19-8-18(e) is the more specific statute because it addresses when a particular type of judgment -- an adoption decree -- may be attacked, while OCGA § 9-11-60(f) addresses when judgments in general may be attacked. Neither statute contains language indicating a legislative intent that a motion to set aside under OCGA § 9-11-60 for lack of jurisdiction is an exception to the specific prohibition in OCGA § 19-8-18(e) against 'any judicial challenge' to an adoption decree."

1140595

The Georgia Court of Appeals subsequently explained the rationale underpinning § 19-8-18(e) in Bates v. Bates, 317 Ga. App. 339, 339-40, 730 S.E.2d 482, 483 (2012), stating:

"Under Georgia law, a judgment entered by a court without jurisdiction is void, Carpenter v. Carpenter, 276 Ga. 746, 747(1), 583 S.E.2d 852 (2003), and generally speaking, such a judgment 'may be attacked in any court, by any person, at any time.' James v. Intown Ventures, 290 Ga. 813, 816(2) n. 5, 725 S.E.2d 213 (2012). See also Cabrel v. Lum, 289 Ga. 233, 235(1), 710 S.E.2d 810 (2011) ('[A] judgment void for lack of personal or subject-matter jurisdiction may be attacked at any time.'). But in some circumstances, these principles must yield to competing principles that derive from the compelling public interest in the finality and certainty of judgments, see Abushmais v. Erby, 282 Ga. 619, 622(3), 652 S.E.2d 549 (2007), an interest that is especially compelling with respect to judgments affecting familial relations. See Amerson v. Vandiver, 285 Ga. 49, 50, 673 S.E.2d 850 (2009)."

See also Abushmais v. Erby, 282 Ga. 619, 622, 652 S.E.2d 549, 552 (2007) (explaining that parties may not "confer subject-matter jurisdiction on a court by agreement or waive the defense [of a lack of subject-matter jurisdiction] by failing to raise it in the trial court" but that, "[u]nder limited circumstances, the equitable defenses of laches and estoppel may prevent a party from complaining of a court's lack of subject-matter jurisdiction"). It is evident from

1140595

these decisions of the Supreme Court of Georgia and the Georgia Court of Appeals that a Georgia court will generally not entertain a challenge to a Georgia adoption decree based even on an alleged lack of subject-matter jurisdiction if that challenge is made more than six months after the challenged decree is entered.

E.L. nevertheless argues that § 19-8-18(e) does not apply in this case because, she argues, the statute by its terms applies only to adoption decrees issued pursuant to § 19-8-18(b), which provides:

"If the court is satisfied that each living parent or guardian of the child has surrendered or had terminated all his rights to the child in the manner provided by law prior to the filing of the petition for adoption or that each petitioner has satisfied his burden of proof under Code Section 19-8-10, that such petitioner is capable of assuming responsibility for the care, supervision, training, and education of the child, that the child is suitable for adoption in a private family home, and that the adoption requested is for the best interest of the child, it shall enter a decree of adoption, terminating all the rights of each parent and guardian to the child, granting the permanent custody of the child to each petitioner, naming the child as prayed for in the petition, and declaring the child to be the adopted child of each petitioner. In all cases wherein Code Section 19-8-10 is relied upon by any petitioner as a basis for the termination of parental rights, the court shall include in the decree of adoption appropriate

1140595

findings of fact and conclusions of law relating to the applicability of Code Section 19-8-10."

E.L. argues that the Georgia court failed to comply strictly with all the requirements of § 19-8-18(b) in this case inasmuch as the Georgia judgment failed to "terminat[e] all the rights of each parent and guardian to the child[ren]." In other words, E.L. argues that the Georgia judgment was not issued pursuant to § 19-8-18(b) -- and thus is not subject to the bar of § 19-8-18(e) -- because it did not terminate her own parental rights. Both the guardian ad litem and the amici curiae argue in their briefs that, regardless of the failure of the Georgia court to terminate E.L.'s parental rights in the Georgia judgment, the Georgia judgment was nonetheless issued pursuant to § 19-8-18(b) because all decrees of adoption in Georgia are issued pursuant to § 19-8-18(b) -- there is, they argue, no other statute under which a Georgia adoption decree can issue.

The Supreme Court of Georgia as a whole has not specifically addressed this issue; however, in Wheeler v. Wheeler, 281 Ga. 838, 642 S.E.2d 103 (2007), a similar case involving a biological mother's attempt to void a second-parent adoption granted her same-sex ex-partner, that court,

1140595

without issuing an opinion, denied a petition for the writ of certiorari filed by the biological mother challenging the Georgia Court of Appeals' decision not to consider her discretionary appeal of the trial court's order denying her petition to void the adoption. However, in a dissenting opinion Justice Carley addressed the argument E.L. now makes:

"[The adoptive mother] argues that the motion to set aside is time-barred by OCGA [Official Code of Georgia Annotated] § 19-8-18(e), although the trial court did not rely on that statute. It reads as follows: 'A decree of adoption issued pursuant to subsection (b) of this Code section shall not be subject to any judicial challenge filed more than six months after the date of entry of such decree.' OCGA § 19-8-18(e). Subsection (b) provides for the entry of a decree terminating all parental rights in those cases where the rights of each living parent or guardian have been surrendered or terminated, or where termination of parental rights is appropriate pursuant to OCGA § 19-8-10. As previously noted, however, subsection (b) obviously does not apply here, because neither surrender nor termination of [the biological mother's] rights was ever sought or accomplished, and the trial court entered a decree specifically preserving her rights. Because subsection (b) is inapplicable, the six-month limitation in subsection (e) clearly does not bar the motion to set aside."

281 Ga. at 841, 642 S.E.2d at 105 (Carley, J., dissenting). We agree with the analysis of Justice Carley and his conclusion that the six-month bar in § 19-8-18(e) should not apply in the current situation. Having concluded that his is

1140595

the proper analysis of § 19-8-18(b) and § 19-8-18(e), we can only assume that a Georgia court would make the same conclusion and, by extension, would permit a challenge on jurisdictional grounds to an adoption decree that did not fully comply with § 19-8-18(b).⁸

We must therefore consider whether, in fact, E.L. has asserted an argument that actually puts the subject-matter jurisdiction of the Georgia court into question. She asserts that the Georgia court lacked subject-matter jurisdiction to issue the Georgia judgment for two reasons -- because it purported to effect a second-parent adoption in which a living parent's parental rights were not terminated and because V.L. allegedly was not a bona fide Georgia resident at the time of the judgment; however, V.L. argues that these arguments in

⁸Although Justice Carley's analysis of § 19-8-18(b) and § 19-8-18(e) was offered in a special writing dissenting from the majority's decision not to grant certiorari review in Wheeler, the majority did not issue an opinion explaining its rationale for denying the petition for the writ of certiorari, and, accordingly, it cannot be presumed that the majority's decision was premised on a contrary analysis of § 19-8-18(b) and § 19-8-18(e). See Wheeler, 281 Ga. at 838-39, 642 S.E.2d at 103 (Carley, J., dissenting) ("With no explanation accompanying the majority's denial of the motion to dismiss, I am left to conjecture." (quoting Perdue v. Baker, 276 Ga. 822, 823-24, 586 S.E.2d 303, 304 (2003) (Benham, J., dissenting))).

1140595

fact implicate only the merits of the Georgia judgment, and not the Georgia court's subject-matter jurisdiction, and the arguments are therefore, V.L. argues, barred by the full faith and credit clause, which "precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based." Milliken v. Meyer, 311 U.S. 457, 462 (1940). The Supreme Court of the United States explained this distinction between a subject-matter-jurisdiction challenge and a merit-based challenge in Fauntleroy v. Lum, 210 U.S. 230, 234-35 (1908):

"No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to the power, the other only to the duty, of the court. Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parole promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless reversed. Yet a statute could be framed that would make the power, that is, the jurisdiction, of the court, dependent upon whether there was a consideration or not. Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense. When it affects a court of general jurisdiction, and deals with a matter upon which that court must pass, we naturally are slow to read ambiguous words as meaning to leave

1140595

the judgment open to dispute, or as intended to do more than to fix the rule by which the court should decide."

In this case, it is undisputed that Georgia superior courts like the Georgia court have subject-matter jurisdiction over, that is, the power to rule on, adoption petitions. Indeed, Georgia Code Ann., § 19-8-2, subtitled "jurisdiction and venue," provides:

"(a) The superior courts of the several counties shall have exclusive jurisdiction in all matters of adoption, except such jurisdiction as may be granted to the juvenile courts."

E.L., however, argues that the Georgia court could properly exercise subject-matter jurisdiction only when the requirements of the Georgia adoption statutes are met, and, in this case, they were not, she argues, because those statutes make no provision for a non-spouse to adopt a child without first terminating the parental rights of the current parents. E.L.'s argument regarding the Georgia adoption statutes appears to be correct, as illustrated by Justice Carley's explanation of those statutes in his dissenting opinion in Wheeler:

"Under certain conditions, a child who has only one living parent 'may be adopted by the spouse of that parent' OCGA [Official Code of Georgia

Annotated] § 19-8-6(a)(2). See also In re C.N.W., [274 Ga. 765, 768, 560 S.E.2d 1, 1 (2002)]. However, [the same-sex ex-partner] is not the spouse of [the biological mother], as '[m]arriages between persons of the same sex are prohibited in this state.' OCGA § 19-3-3.1(a). See also Ga. Const. of 1983, Art. I, § IV, Par. I(a) (approved in 2004); In the Interest of Angel Lace M., [184 Wis. 2d 492, 507, 516 N.W.2d 678, 682 (1994)]. Under OCGA §§ 19-8-5(a) and 19-8-7(a), a third party who is not a stepparent, such as [the same-sex ex-partner], may adopt the child only if the parent's rights are surrendered, or are terminated pursuant to OCGA § 19-8-10. However, neither the surrender nor termination of [the biological mother's] parental rights was ever sought or ordered. Instead, the adoption petition was based on [the biological mother's] consent to the adoption, wherein she expressly refused to relinquish or surrender her parental rights, and the trial court declared that the child would have 'two legal parents' and awarded permanent custody to both. OCGA § 19-8-19(a)(1) specifically proscribes such an order: 'Except with respect to a spouse of the petitioner and relatives of the spouse, a decree of adoption terminates all legal relationships between the adopted individual and his relatives, including his parent....' 'If the legislature had intended to sanction adoptions by nonmarital partners, it would not have mandated this "cut-off" of ["all legal relationships"] of the birth parents in these adoptions.' In the Interest of Angel Lace M., *supra* at 683."⁹

⁹We note that V.L. has not argued in this case that she was the spouse of E.L. and thus entitled to adopt the children on that basis. To the contrary, she asserts in her brief to this Court that

"this case has nothing to do with marriage. V.L. is not a stepparent and was permitted to adopt as an unmarried person. Recognizing V.L.'s adoption and treating her like any other adoptive parent does not

1140595

281 Ga. at 840, 642 S.E.2d at 104. See also Bates, 317 Ga. App. at 341, 730 S.E.2d at 484 ("The idea that Georgia law permits a 'second parent' adoption is a doubtful one ... and the arguments that [the appellant] presses about the validity of a decree that purports to recognize such an adoption might well have some merit."). We further note that our own Court of Civil Appeals considered this issue when this case was before it and concluded that "[its] independent review of the Georgia Adoption Code fully supports Justice Carley's position." E.L. v. V.L., ____ So. 3d at ____.

Having now conducted our own analysis of the Georgia adoption statutes, we echo the conclusion of Justice Carley and the Court of Civil Appeals that Georgia law makes no provision for a non-spouse to adopt a child without first terminating the parental rights of the current parents. It is undisputed that a termination of E.L.'s parental rights did not occur in this case; thus, it would appear to be undisputed that the Georgia court erred by entering the Georgia judgment

involve or require recognizing the parties' marriage in any way; as a legal matter, the two are completely unrelated."

V.L.'s brief, at p. 7.

1140595

by which V.L. became an adoptive parent of the children. Our inquiry does not end here, however, as that error is ultimately of no effect unless it implicates the subject-matter jurisdiction of the Georgia court. While not conceding that the Georgia court erred, V.L. argues that any such error has no bearing on whether the Georgia court had subject-matter jurisdiction to issue the Georgia judgment, stating:

"The question of whether the Georgia court properly interpreted and applied Georgia's adoption statutes to grant an adoption to V.L. without terminating E.L.'s rights as a parent is not a question of subject-matter jurisdiction, but rather of whether the adoption as pled was a cognizable action under Georgia law. 'The legal question of the cognizability of an alleged cause of action under state law goes to the merits of a lawsuit asserting that cause of action rather than the subject-matter jurisdiction of the court to decide the legal question.' South Alabama Gas District v. Knight, 138 So. 3d 971, 979 (Ala. 2013) (Murdock, J., concurring in the rationale in part and concurring in the result); see also Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31, 46 (Ala. 2013) ('"Lack of statutory authorization best supports analysis as the lack of a claim upon which relief can be granted ... not a claim over which the forum court lacks subject-matter jurisdiction"') (quoting Jerome A. Hoffman, The Malignant Mystique of 'Standing', 73 Ala. Law. 360, 362 (2012)). Therefore, if the Georgia court had subject-matter jurisdiction over the adoption, which it did, E.L. is prohibited from challenging the judgment on any grounds, including arguing that Georgia does not allow anyone other than a spouse to

1140595

adopt without terminating the rights of the existing parent."

V.L.'s brief, at pp. 24-25. The Court of Civil Appeals in fact agreed with this argument, stating in its opinion:

"Although it may be that the Georgia court erroneously construed Georgia law so as to permit V.L. to adopt the children as a 'second parent,' that error goes to the merits of the case and not to the subject-matter jurisdiction of the Georgia court. See Pirtek USA, LLC v. Whitehead, 51 So. 3d [291,] 296 [(Ala. 2010)] (holding that court in making inquiry into jurisdiction of foreign court to enter judgment cannot consider merits or correctness of foreign judgment)."

E.L. v. V.L., ____ So. 3d at ____.

However, we disagree. "The requirements of Georgia's adoptions statutes are mandatory and must be strictly construed in favor of the natural parents" In re Marks, 300 Ga. App. 239, 243, 684 S.E.2d 364, 367 (2009). See also Doby v. Carroll, 274 Ala. 273, 274, 147 So. 2d 803, 804 (1962) ("In Alabama, the right of adoption is purely statutory and in derogation of the common law, ... and unless the statute by express provision or necessary implication confers the right to adoption, such right does not exist."). Although § 19-8-2(a) of the Georgia Code gives superior courts such as the Georgia court exclusive jurisdiction to enter adoption

1140595

decrees, Georgia Code Ann., § 19-8-5(a), further defines the condition that must exist before such superior courts can grant adoptions to third parties such as V.L. -- "each such living parent ... has voluntarily and in writing surrendered all of his rights to the child to that third person for the purpose of enabling that third person to adopt the child." As explained supra, it is undisputed that E.L. did not surrender her parental rights in this case; accordingly, the Georgia court was not empowered to enter the Georgia judgment declaring V.L. to be an adoptive parent of the children. That is to say, the Georgia court lacked subject-matter jurisdiction to enter the Georgia judgment. The Georgia judgment is accordingly void, and the full faith and credit clause does not require the courts of Alabama to recognize that judgment. Indeed, it would be error for the courts of this State to do so, and, to the extent the judgments of the Jefferson Family Court and Court of Civil Appeals did give effect to the Georgia judgment, they did so in error.¹⁰

¹⁰Because we have held that the Georgia judgment is void for lack of subject-matter jurisdiction based on the fact that the Georgia adoption statutes make no provision for a non-spouse to adopt a child without first terminating the parental rights of the current parents, we need not consider E.L.'s other arguments that the Georgia judgment is also void because

IV.

We granted the petition for a writ of certiorari filed by E.L. to review the judgment entered by the Court of Civil Appeals insofar as that judgment affirmed the Jefferson Family Court's judgment recognizing as valid the Georgia judgment approving the adoption by V.L. of the children of her former same-sex partner E.L. After reviewing the record and analyzing the relevant law of both this State and Georgia, we now conclude that the Court of Civil Appeals and the Jefferson Family Court erred in giving full faith and credit to the Georgia judgment because the Georgia court was without subject-matter jurisdiction to issue the Georgia judgment. Accordingly, the judgment of the Court of Civil Appeals is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Moore, C.J., and Stuart, Bolin, Main, and Wise, JJ.,
concur.

Parker, J., concurs specially.

V.L. was not a bona fide resident of Georgia or that the courts of this State need not recognize that judgment because, E.L. alleges, it is contrary to the public policy of Alabama.

1140595

Murdock, J., concurs in the result.

Shaw, J., dissents.

1140595

PARKER, Justice (concurring specially).

It is well settled in Alabama that adoption is a purely statutory right. "In Alabama, the right of adoption is purely statutory and in derogation of the common law, ... and unless the statute by express provision or necessary implication confers the right of adoption, such right does not exist." Evans v. Rosser, 280 Ala. 163, 164-65, 190 So. 2d 716, 717 (1966) (citing Doby v. Carroll, 274 Ala. 273, 147 So. 2d 803 (1962)). In Hanks v. Hanks, 281 Ala. 92, 99, 199 So. 2d 169, 176 (1967), this Court similarly stated:

"The right of adoption, that is, to confer on the child of another a title to the privileges and rights of a child and appointment as heir of the adopting person is purely statutory, and was never recognized by the rules of common law. Abney v. DeLoach, Admr., 84 Ala. 393, 4 So. 757 [(1888)]; Franklin v. White, 263 Ala. 223, 82 So. 2d 247 [(1955)]; Milton v. Summers, 280 Ala. 106, 190 So. 2d 540 [(1966)]."

Alabama has unequivocally held that adoption is a purely statutory right; an Alabamian's right to adopt does not exist apart from Alabama's positive law. Thus, adoption is a privilege, not a right.¹¹

¹¹In Alabama, we have consistently referred to the statutory "right of adoption." It must be stressed that adoption is a statutory right, not a natural or fundamental right:

1140595

Stating explicitly what is implicit in the above caselaw: there is no fundamental right to adopt. Instead, as set forth above, "adoption is a status created by the state acting as parens patriae, the sovereign parent."¹² Douglas v. Harrison, 454 So. 2d 984, 986 (Ala. Civ. App. 1984) (citing Ex parte

"While adoption has often been referred to in the context of a 'right' of adoption, the right to adopt is not absolute, and ... such 'right' is not a natural or fundamental one but rather a right created by statute. Furthermore, adoption statutes confer a privilege rather than a right; that is, adoption is not a right, but a privilege which is governed not by the wishes of the prospective parents but by the state's determination that a child is best served by a particular disposition. Similarly stated, adoption is not a fundamental right but is rather a creature of statute. Adoption has sometimes been characterized as a 'status' created by the state, and an 'opportunity,' rather than a right, to adopt has been said to be a legislatively created device."

2 Am. Jur. 2d Adoption § 6 (2004) (footnotes omitted).

¹²Of course, the State may act as parens patriae only as to children who actually need rescuing. In my special concurrence to Ex parte E.R.G., 73 So. 3d 634 (Ala. 2011), I stated that a parent has a fundamental right to parent his or her children that is disturbed only ""in those extreme instances where the state takes over to rescue the child from parental neglect or to save its life."" 73 So. 3d at 655 (quoting R.J.D. v. Vaughan Clinic, P.C., 572 So. 2d 1225, 1228 (Ala. 1990), quoting in turn 59 Am. Jur. 2d Parent and Child § 48 at 194 (1987)). Only once a child has been determined to be "dependent" does the State have any jurisdiction to intrude into the "separate and legitimate human government" that is the family. 73 So. 3d at 650.

1140595

Bronstein, 434 So. 2d 780 (Ala. 1983)). Of course, having created the purely statutory right of adoption, the State has the authority to specify the contours of that right,¹³ which it has done in the Alabama Adoption Code, Ala. Code 1975, § 26-10A-1 et seq. In Ex parte Sullivan, 407 So. 2d 559, 562-63 (Ala. 1981), this Court stated:

"Adoption is purely statutory. It was unknown to the common law. The courts of this state have always required strict adherence to statutory requirements in adoption proceedings. No case has stated this principle better than the Court of Civil Appeals in Davis v. Turner, 337 So. 2d 355 (Ala. Civ. App. 1976), where it said:

"'Adoption is strictly statutory, Hanks v. Hanks, 281 Ala. 92, 199 So. 2d 169 [(1967)]. Being unknown at common law, it cannot be achieved by contract, Prince v. Prince, 194 Ala. 455, 69 So. 906 [(1915)]. Adoption is not merely an arrangement between the natural and adoptive parents, but is a status created by the state acting as parens patriae, the sovereign parent. Because the exercise of sovereign power involved in adoption curtails the fundamental parental rights of the natural

¹³See Stevenson v. King, 243 Ala. 551, 553, 10 So. 2d 825, 826 (1942) (recognizing that the purely statutory right of mortgage redemption, which did not exist at common law but was created by the positive law of Alabama, "must be exercised by the person and in the mode and manner prescribed by the statute" and that "[i]t [is] entirely within the competency of the Legislature to determine the conditions upon which the right could be granted").

1140595

parent, the adoption statutes must be closely adhered to.'

"337 So. 2d at 360-361."

Among other things, the State, acting as parens patriae, has the authority to determine who may adopt based on the best interest of the child to be adopted. To this end, the United States Court of Appeals for the Eleventh Circuit has held that a state has a legitimate interest in encouraging a stable and nurturing environment for an adopted child by encouraging that the child be raised in the optimal family structure with both a father and a mother:

"Florida clearly has a legitimate interest in encouraging a stable and nurturing environment for the education and socialization of its adopted children. See, e.g., Palmore v. Sidoti, 466 U.S. 429, 433, 104 S. Ct. 1879, 1882, 80 L. Ed. 2d 421 (1984) ('The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years.');

Stanley v. Illinois, 405 U.S. [645,] 652, 92 S. Ct. [1208,] 1213 [(1972)] (noting that 'protect[ing] the moral, emotional, mental, and physical welfare of the minor' is a 'legitimate interest[], well within the power of the State to implement') (internal quotation marks omitted). It is chiefly from parental figures that children learn about the world and their place in it, and the formative influence of parents extends well beyond the years spent under their roof, shaping their children's psychology, character, and personality for years to come. In time, children grow up to become full members of society, which they in turn influence,

whether for good or ill. The adage that 'the hand that rocks the cradle rules the world' hardly overstates the ripple effect that parents have on the public good by virtue of their role in raising their children. It is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society -- particularly when those future citizens are displaced children for whom the state is standing in loco parentis.

"More importantly for present purposes, the state has a legitimate interest in encouraging this optimal family structure by seeking to place adoptive children in homes that have both a mother and father. Florida argues that its preference for adoptive marital families is based on the premise that the marital family structure is more stable than other household arrangements and that children benefit from the presence of both a father and mother in the home. Given that appellants have offered no competent evidence to the contrary, we find this premise to be one of those 'unprovable assumptions' that nevertheless can provide a legitimate basis for legislative action. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 62-63, 93 S. Ct. 2628, 2638, 37 L. Ed. 2d 446 (1973). Although social theorists from Plato to Simone de Beauvoir have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model. See, e.g., Plato, The Republic, Bk. V, 459d-461e; Simone de Beauvoir, The Second Sex (H.M. Parshley trans., Vintage Books 1989) (1949). Against this 'sum of experience,' it is rational for Florida to conclude that it is in the best interests of adoptive children, many of whom come from troubled and unstable backgrounds, to be placed in a home

1140595

anchored by both a father and a mother. Paris Adult Theatre I, 413 U.S. at 63, 93 S. Ct. at 2638."

Lofton v. Secretary of Dep't of Children & Family Servs., 358 F.3d 804, 819-20 (11th Cir. 2004).

In summary, adoption is a purely statutory right created by the State acting as parens patriae; there exists no fundamental right to adopt a child. Acting in the role of parens patriae, the State has a legitimate interest in encouraging that children be adopted into the optimal family structure, i.e., one with both a father and a mother.

1140595

SHAW, Justice (dissenting).

I dissent. The main opinion reviews the merits of the adoption in this case; our caselaw, interpreting the United States Constitution, does not permit this Court to do so.

The main opinion holds that the Superior Court of Fulton County, Georgia ("the Georgia court"), was not "empowered" to allow the adoption in this case--and thus lacked subject-matter jurisdiction--because it did not comply with Georgia Code Ann., § 19-8-5(a) and § 19-8-18(b). Section 19-8-5(a) designates that a child may be adopted by a "third party" if the rights of the living parents or guardians have been surrendered. Section 19-8-18(b) requires, among other things, that the court be "satisfied" that this has occurred. These provisions speak to the merits of whether the adoption should be granted--not to whether the trial court obtains subject-matter jurisdiction. Jurisdiction is instead provided by Georgia Code Ann., § 19-8-2(a), which states that the superior courts of Georgia have jurisdiction "in all matters of adoption." (Emphasis added.) This would include adoption matters where the petitioners fail to "satisfy" the court that

1140595

the requisites for an adoption were met. The Supreme Court of Georgia has defined "subject-matter jurisdiction" as follows:

"The phrase 'subject-matter jurisdiction,' as defined by this Court, 'refers to subject matter alone,' i.e., 'conferring jurisdiction in specified kinds of cases.'" "Jurisdiction of the subject matter does not mean simply jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which that particular case belongs."'

Abushmais v. Erby, 282 Ga. 619, 620, 652 S.E.2d 549, 550 (2007) (citations omitted). The adoption petition in the instant case, whether meritorious or not, was part of the class of cases within the Georgia court's jurisdiction to decide. § 19-8-2(a). The fact that the adoption should not have been granted does not remove the case from the class of cases within that court's power.

I see no support for the proposition that, if a petitioner fails to show that an adoption is warranted or permissible under Georgia law, then the court in Georgia is suddenly divested of jurisdiction over the subject matter. Indeed, Georgia's adoption code seems to provide the opposite. Specifically, Georgia Code Ann., § 19-8-18(c), states: "If the court determines that any petitioner has not complied with this chapter, it may dismiss the petition for adoption without

1140595

prejudice or it may continue the case." (Emphasis added.) Both §§ 19-8-5(a) and 19-8-18(b) are part of "this chapter," namely, chapter 8 of title 19 of the Official Code of Georgia. If a petitioner has failed to comply with anything in chapter 8, the result is not a loss of subject-matter jurisdiction, based on the simple fact that the court is still empowered to continue the case. Sections 19-8-5(a) and 19-8-18(b) cannot be read to deny the court subject-matter jurisdiction if it may nevertheless continue hearing the case despite noncompliance with those sections.¹⁴

When a party seeking to obtain an adoption fails to show that the adoption is permissible, then that party has simply failed to prove the merits of his or her case:

"If in the end the facts do not support the plaintiffs, or the law does not do so, so be it--but this does not mean the plaintiffs cannot come into court and allege, and attempt to prove, otherwise.

¹⁴Under Georgia law, although the trial court may find that the requirements for an adoption were not met, it may nevertheless place custody of the child with the petitioners, an act antithetical to the idea that the court possesses no subject-matter jurisdiction. In re Stroh, 240 Ga. App. 835, 523 S.E.2d 887 (1999) (affirming the trial court's denial of an adoption on the grounds that the petitioners were not residents of Georgia under Georgia Code Ann. § 19-8-3(a)(3), but nevertheless holding that the trial court erred in refusing to place custody of the child with the petitioners).

1140595

If they fail in this endeavor ... they have a 'cause of action' problem, or more precisely in these cases, a 'failure to prove one's cause of action' problem. The trial court has subject-matter jurisdiction to 'hear' such 'problems'--and the cases in which they arise."

Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31, 46 (Ala. 2013). Stated differently, "[t]he legal question of the cognizability of an alleged cause of action under state law goes to the merits of a lawsuit asserting that cause of action rather than the subject-matter jurisdiction of the court to decide that legal question." South Alabama Gas Dist. v. Knight, 138 So. 3d 971, 979 (Ala. 2013) (Murdock, J., concurring in the rationale in part and concurring in the result). In BAC and several other cases, e.g., Poiroux v. Rich, 150 So. 3d 1027 (Ala. 2014), and Ex parte MERSCORP, Inc., 141 So. 3d 984 (Ala. 2013), this Court has rejected the idea that a simple failure to prove an element of a statutorily provided cause of action results in the lack of subject-matter jurisdiction. I have recently noted, however, that this Court "appears to [have] signal[ed] a retreat" from that principle. McDaniel v. Ezell, [Ms. 1130372, Jan. 30, 2015] ___ So. 3d ___, ___ (Shaw, J., dissenting). Under the rationale of the main opinion, that retreat is now complete.

The rationale of Justice Carley's dissenting opinion in Wheeler v. Wheeler, 281 Ga. 838, 642 S.E.2d 103 (2007), would hold that § 19-8-18(b) would not allow the type of adoption that occurred in the instant case. Thus, as the main opinion states, "the Georgia court erred by entering the Georgia judgment by which V.L. became an adoptive parent of the children." ___ So. 3d at ___ (emphasis added). I tend to agree; however, this is an error on the merits, not an error that deprived the Georgia court of subject-matter jurisdiction. As the Court of Civil Appeals stated: "Although it may be that the Georgia court erroneously construed Georgia law so as to permit V.L. to adopt the children as a 'second parent,' that error goes to the merits of the case and not to the subject-matter jurisdiction of the Georgia court." E.L. v. V.L., [Ms. 2130683, Feb. 27, 2015] ___ So. 3d ___, ___ (Ala. Civ. App. 2015). Our caselaw prohibits an inquiry into the merits of a foreign judgment. Pirtek USA, LLC v. Whitehead, 51 So. 3d 291, 296 (Ala. 2010) ("Full faith and credit prohibits an inquiry into the merits of the original cause of action." (quoting Tonque, Brooks & Co. v. Walser, 410 So. 2d 89, 90 (Ala. Civ. App. 1982))). Further, I fear

1140595

that this case creates a dangerous precedent that calls into question the finality of adoptions in Alabama: Any irregularity in a probate court's decision in an adoption would now arguably create a defect in that court's subject-matter jurisdiction.



Positive

As of: August 29, 2016 4:57 PM EDT

V.L. v. E.L.

Supreme Court of the United States

March 7, 2016, Decided

No. 15-648

Reporter

136 S. Ct. 1017; 194 L. Ed. 2d 92; 2016 U.S. LEXIS 1653; 84 U.S.L.W. 4130; 26 Fla. L. Weekly Fed. S 22

V. L., Petitioner v. E. L., et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: On remand at, Decision reached on appeal by Ex parte E.L., 2016 Ala. LEXIS 65 (Ala., May 27, 2016)

Prior History: [***1] ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Ex parte E.L., 2015 Ala. LEXIS 110 (Ala., Sept. 18, 2015)

Core Terms

jurisdictional, full faith and credit, superior court, parental rights, subject-matter, courts, merits

Case Summary

Overview

HOLDINGS: [1]-The Alabama Supreme Court erred in refusing to grant full faith and credit to a Georgia court's judgment of adoption making petitioner a legal parent of the children that she and respondent had raised together where neither the statute upon which it relied, O.C.G.A. § 19-8-5(a), nor the Georgia courts indicated that the statute was jurisdictional, and thus, there was nothing to rebut the presumption that the Georgia judgment was issued by a court with jurisdiction.

Outcome

Petition granted; judgment reversed; case remanded. Per curiam decision.

LexisNexis® Headnotes

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Enforcement of Judgments

Constitutional Law > Relations Among Governments > Full Faith & Credit

HNI The United States Constitution provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. U. S. Const. art. IV, § 1. The Full Faith and Credit Clause requires each state to recognize and give effect to valid judgments rendered by the courts of its sister states. It serves to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation.

Constitutional Law > Relations Among Governments > Full Faith & Credit

Civil Procedure > Judgments > Preclusion of Judgments > Full Faith & Credit



HN2 With respect to judgments, the full faith and credit obligation of U.S. Const. art. IV, § 1, is exacting. A final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. A state may not disregard the judgment of a sister state because it disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits. On the contrary, the Full Faith and Credit Clause of the United States Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based.

Civil Procedure > Judgments > Preclusion of Judgments > Full Faith & Credit

Constitutional Law > Relations Among Governments > Full Faith & Credit

HN3 A state is not required to afford full faith and credit to a judgment rendered by a court that did not have jurisdiction over the subject matter or the relevant parties. Consequently, before a court is bound by a judgment rendered in another state, it may inquire into the jurisdictional basis of the foreign court's decree. That jurisdictional inquiry, however, is a limited one. If the judgment on its face appears to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Family Law > Adoption > Adoption Procedures

HN4 Under Georgia law, the superior courts of the several counties shall have exclusive jurisdiction in all matters of adoption. O.C.G.A. § 19-8-2(a) (2015).

Family Law > Adoption > Consent > Biological Parents

Family Law > Adoption > Consent > Legal Guardians

HN5 O.C.G.A. § 19-8-5(a) states that a child who has any living parent or guardian may be adopted by a third party only if each such living parent and each such guardian has voluntarily and in writing surrendered all of his or her rights to such child.

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Enforcement of Judgments

HN6 Where a judgment indicates on its face that it was rendered by a court of competent jurisdiction, such jurisdiction is to be presumed unless disproved.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Family Law > Adoption > Consent > Biological Parents

Family Law > Adoption > Consent > Legal Guardians

Family Law > Adoption > Adoption Procedures

HN7 Georgia recognizes that in general, subject-matter jurisdiction addresses whether a court has jurisdiction to decide a particular class of cases, not whether a court should grant relief in any given case. Unlike O.C.G.A. § 19-8-2(a) (2015), which expressly gives Georgia superior courts exclusive jurisdiction in all matters of adoption, O.C.G.A. § 19-8-5(a) does not speak to whether a court has the power to decide a general class of cases. It only provides a rule of decision to apply in determining if a particular adoption should be allowed.

Family Law > Adoption > Adoption Procedures

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

HN8 O.C.G.A. § 19-8-5(a) does not become jurisdictional just because it is mandatory and must be strictly construed. Judicial precedent has long rejected the notion that all mandatory prescriptions, however emphatic, are properly typed jurisdictional.

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Enforcement of Judgments

Constitutional Law > Relations Among Governments > Full Faith & Credit

HN9 It sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits. In such cases, especially where the *Full Faith and Credit Clause* is concerned, a court must be slow to read ambiguous words, as meaning to leave the judgment open to dispute, or as intended to do more than fix the rule by which the court should decide.

Lawyers' Edition Display

Decision

[92]** *Federal Constitution's full faith and credit clause (Art. IV, § 1)* required Alabama courts to respect Georgia court's judgment of adoption making woman parent of children she and another woman--who gave birth to children--raised together from birth before women separated while residing in Alabama.

Summary

Overview: **HOLDINGS:** [1]-The Alabama Supreme Court erred in refusing to grant full faith and credit to a Georgia court's judgment of adoption making petitioner a legal parent of the children that she and respondent had raised together where neither the statute upon which it relied, *O.C.G.A. § 19-8-5(a)*, nor the Georgia courts indicated that the statute was jurisdictional, and thus, there was nothing to rebut the presumption that the Georgia judgment was issued by a court with jurisdiction.

Outcome: Petition granted; judgment reversed; case remanded. Per curiam decision.

Headnotes

JUDGMENT §360.5 > FULL FAITH AND CREDIT -- PURPOSE > Headnote:

LEdHN[1] [1]

The United States Constitution provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. *U.S. Const. Art. IV, § 1*. The *full faith and credit clause* requires each state to recognize and give effect to valid judgments rendered by the courts of its sister states. It serves to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation.

JUDGMENT §360 > FULL FAITH AND CREDIT > Headnote:

LEdHN[2] [2]

With respect to judgments, the full faith and credit obligation of *U.S. Const. Art. IV, § 1*, is exacting. A final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. A state may not disregard the judgment of a sister state because it disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits. On the contrary, the *full faith and credit clause of the United States Constitution* precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based.

JUDGMENT §357 > FULL FAITH AND CREDIT -- INQUIRY INTO JURISDICTION > Headnote:

LEdHN[3] [3]

A state is not required to afford full faith and credit to a judgment rendered by a court that did not have jurisdiction over the subject matter or the relevant parties. Consequently, before a court is bound by a judgment rendered in another state, it may inquire into the jurisdictional basis of the foreign court's decree. That jurisdictional inquiry, however, is a limited one. If the

136 S. Ct. 1017, *1017; 194 L. Ed. 2d 92, **92; 2016 U.S. LEXIS 1653, ***1

judgment on its face appears to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself.

COURTS §177 > JURISDICTION -- COUNTY COURTS > Headnote:

LEdHN[4] [4]

Under Georgia law, the superior courts of the several counties shall have exclusive jurisdiction in all matters of adoption. O.C.G.A. § 19-8-2(a) (2015).

PARENT AND CHILD §5 > ADOPTION > Headnote:

LEdHN[5] [5]

O.C.G.A. § 19-8-5(a) states that a child who has any living parent or guardian may be adopted by a third party only if each such living parent and each such guardian has voluntarily and in writing surrendered all of his or her rights to such child.

EVIDENCE §275 > PRESUMPTION OF JURISDICTION > Headnote:

LEdHN[6] [6]

Where a judgment indicates on its face that it was rendered by a court of competent jurisdiction, such jurisdiction is to be presumed unless disproved.

COURTS §173 > STATE JURISDICTION -- ADOPTION > Headnote:

LEdHN[7] [7]

Georgia recognizes that in general, subject-matter jurisdiction addresses whether a court has jurisdiction to decide a particular class of cases, not whether a court should grant relief in any given case. Unlike O.C.G.A. § 19-8-2(a) (2015), which expressly gives Georgia superior courts exclusive jurisdiction in all matters of adoption, O.C.G.A. § 19-8-5(a) does not speak to whether a court has the power to decide a general class of cases. It only provides a rule of decision to apply in determining if a particular adoption should be allowed.

COURTS §173 > STATE JURISDICTION > Headnote:

LEdHN[8] [8]

O.C.G.A. § 19-8-5(a) does not become jurisdictional just because it is mandatory and must be strictly construed. Judicial precedent has long rejected the notion that all mandatory prescriptions, however emphatic, are properly typed jurisdictional.

STATUTES §164.6 > WORDS -- JURISDICTION -- MERITS > Headnote:

LEdHN[9] [9]

It sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits. In such cases, especially where the full faith and credit clause is concerned, a court must be slow to read ambiguous words, as meaning to leave the judgment open to dispute, or as intended to do more than fix the rule by which the court should decide.

Judges: Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan.

Opinion

[**94] [*1019] PER CURIAM.

A Georgia court entered a final judgment of adoption making petitioner V. L. a legal parent of the children that she and respondent E. L. had raised together from birth. V. L. and E. L. later separated while living in Alabama. V. L. asked the Alabama courts to enforce the Georgia judgment and grant her custody or visitation rights. The Alabama Supreme Court ruled against her, holding that the Full Faith and Credit Clause of the United States Constitution does not require the Alabama courts to respect the Georgia judgment. That judgment of the Alabama Supreme Court is now reversed by this summary disposition.

I

V. L. and E. L. are two women who were in a relationship from approximately 1995 until 2011. Through assisted reproductive technology, E. L. gave birth to a child named S. L. in 2002 and to twins named N. L. and H. L. in 2004. After the children were born, V. L. and E. L. raised them together as joint parents.

V. L. and E. L. eventually decided to give legal status to the relationship between V. L. and the children by having V. L. formally adopt them. To facilitate the adoption, the couple rented a[***2] house in Alpharetta, Georgia. V. L. then filed an adoption petition in the Superior Court of Fulton County, Georgia. E. L. also appeared [**95] in that proceeding. While not relinquishing her own parental rights, she gave her express consent to V. L.'s adoption of the children as a second parent. The Georgia court determined that V. L. had complied with the applicable requirements of Georgia law, and entered a final decree of adoption allowing V. L. to adopt the children and recognizing both V. L. and E. L. as their legal parents.

V. L. and E. L. ended their relationship in 2011, while living in Alabama, and V. L. moved out of the house that the couple had shared. V. L. later filed a petition in the Circuit Court of Jefferson County, Alabama, alleging that E. L. had denied her access to the children and interfered with her ability to exercise her parental rights. She asked the Alabama court to register the Georgia adoption judgment and award her some measure of custody or visitation rights. The matter was transferred to the Family Court of Jefferson County. That court entered an order awarding V. L. scheduled visitation with the children.

E. L. appealed the visitation order to the Alabama[***3] Court of Civil Appeals. She argued, among other points, that the Alabama courts should not recognize the [*1020] Georgia judgment because the Georgia court lacked subject-matter jurisdiction to enter it. The Court of Civil Appeals rejected that argument. It held, however, that the Alabama family court had erred by failing to conduct an evidentiary hearing before awarding V. L. visitation rights, and so it remanded for the family court to conduct that hearing.

The Alabama Supreme Court reversed. It held that the Georgia court had no subject-matter jurisdiction under Georgia law to enter a judgment allowing V. L. to adopt the children while still recognizing E. L.'s parental rights. As a consequence, the Alabama Supreme Court held Alabama courts were not required to accord full faith and credit to the Georgia judgment.

II

HN1 LE4HN[1] [1] The Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U. S. Const., Art. IV, §1. That Clause requires each State to recognize and give effect to valid judgments rendered by the courts of its sister States. It serves "to alter the status of the several states as independent foreign sovereignties, each free to [***4] ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation." Michigan County v. M. E. White Co., 296 U. S. 268, 273, 26 S. Ct. 229, 80 L. Ed. 220 (1935).

HN2 LE4HN[2] [2] With respect to judgments, "the full faith and credit obligation is exacting." Baker v. General Motors Corp., 522 U. S. 222, 233, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998). "A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." *Ibid.* A State may not disregard the judgment of a sister State because it disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits. On the contrary, "the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, [**96] or the validity of the legal principles on which the judgment is based." Miliken v. Meyer, 311 U. S. 457, 462, 61 S. Ct. 339, 85 L. Ed. 278 (1940).

HN3 LE4HN[3] [3] A State is not required, however, to afford full faith and credit to a judgment rendered by a court that "did not have jurisdiction over the subject matter or the relevant parties." Underwriters Nat. Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Assn., 455 U. S. 691, 705, 102 S. Ct. 1357, 71 L. Ed. 2d 558 (1982). "Consequently, before a court is bound by [a] judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's

decree.” *Ibid.* That jurisdictional inquiry, however, is a limited one. “[I]f the judgment [***5] on its face appears to be a ‘record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself.’” *Milliken, supra*, at 462, 61 S. Ct. 339, 85 L. Ed. 278 (quoting *Adam v. Saenger*, 303 U.S. 59, 62, 58 S. Ct. 454, 82 L. Ed. 649 (1938)).

Those principles resolve this case. **HN4 LEdHN[4]** [4] Under Georgia law, as relevant here, “[t]he superior courts of the several counties shall have exclusive jurisdiction in all matters of adoption.” *Ga. Code Ann. §19-8-2(a)* (2015). That provision on its face gave the Georgia Superior Court subject-matter jurisdiction to hear and decide the adoption petition at issue here. The Superior Court resolved that matter by entering a final judgment that made V. L. the legal adoptive parent of the children. [*1021] Whatever the merits of that judgment, it was within the statutory grant of jurisdiction over “all matters of adoption.” *Ibid.* The Georgia court thus had the “adjudicatory authority over the subject matter” required to entitle its judgment to full faith and credit. *Baker, supra*, at 233, 118 S. Ct. 657, 139 L. Ed. 2d 580.

The Alabama Supreme Court reached a different result by relying on *Ga. Code Ann. §19-8-5(a)*. **HN5 LEdHN[5]** [5] That statute states (as relevant here) that “a child who has any living parent or guardian may be adopted by a third party . . . only if each such living parent and each [***6] such guardian has voluntarily and in writing surrendered all of his or her rights to such child.” The Alabama Supreme Court concluded that this provision prohibited the Georgia Superior Court from allowing V. L. to adopt the children while also allowing E. L. to keep her existing parental rights. It further concluded that this provision went not to the merits but to the Georgia court’s subject-matter jurisdiction. In reaching that crucial second conclusion, the Alabama Supreme Court seems to have relied solely on the fact that the right to adoption under Georgia law is purely statutory, and “[t]he requirements of Georgia’s adoptions statutes are mandatory and must be strictly construed in favor of the natural parents.” App. to Pet. for Cert. 23a-24a (quoting *In re Marks*, 300 Ga. App. 239, 243, 684 S. E. 2d 364, 367 (2009)).

That analysis is not consistent with this Court’s controlling precedent. **HN6 LEdHN[6]** [6] Where a judgment indicates on its face that it was rendered by a court of competent jurisdiction, such jurisdiction “‘is to be presumed unless disproved.’” *Milliken, supra*, at 462, 61 S. Ct. 339, 85 L. Ed. 278 (quoting *Adam, supra*, at 62, 58 S. Ct. 454, 82 L. Ed. 649). There is nothing here to [***97] rebut that presumption. The Georgia statute on which the Alabama Supreme Court relied, *Ga. Code Ann. §19-8-5(a)*, does not speak in jurisdictional terms; for instance, it [***7] does not say that a Georgia court “shall have jurisdiction to enter an adoption decree” only if each existing parent or guardian has surrendered his or her parental rights. Neither the Georgia Supreme Court nor any Georgia appellate court, moreover, has construed §19-8-5(a) as jurisdictional. That construction would also be difficult to reconcile with Georgia law. **HN7 LEdHN[7]** [7] Georgia recognizes that in general, subject-matter jurisdiction addresses “whether a court has jurisdiction to decide a particular class of cases,” *Goodrum v. Goodrum*, 283 Ga. 163, 657 S. E. 2d 192 (2008), not whether a court should grant relief in any given case. Unlike §19-8-2(a), which expressly gives Georgia superior courts “exclusive jurisdiction in all matters of adoption,” §19-8-5(a) does not speak to whether a court has the power to decide a general class of cases. It only provides a rule of decision to apply in determining if a particular adoption should be allowed.

HN8 LEdHN[8] [8] *Section 19-8-5(a)* does not become jurisdictional just because it is “‘mandatory’” and “‘must be strictly construed.’” App. to Pet. for Cert. 23a-24a (quoting *Marks, supra*, at 243, 684 S. E. 2d, at 367). This Court “has long rejected the notion that all mandatory prescriptions, however emphatic, are properly typed jurisdictional.” *Gonzalez v. Thaler*, 565 U.S. 134, 134, 565 U.S. 134, 132 S. Ct. 641, 651, 181 L. Ed. 2d 619, 633 (2012) (internal quotation marks and ellipsis omitted). Indeed, the Alabama [***8] Supreme Court’s reasoning would give jurisdictional status to every requirement of the Georgia adoption statutes, since Georgia law indicates those requirements are all mandatory and must be strictly construed. *Marks, supra*, at 243, 684 S. E. 2d, at 367. That result would comport neither with Georgia law nor with common sense.

[*1022] As Justice Holmes observed more than a century ago, **HN9 LEdHN[9]** [9] “it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits.” *Fauntleroy v. Lum*, 210 U.S. 230, 234-235, 28 S. Ct. 641, 52 L. Ed. 1039 (1908). In such cases, especially where the *Full Faith and Credit Clause* is concerned, a court must be “slow to read ambiguous words, as meaning to leave the judgment open to dispute, or as intended to do more than fix the rule by which the court should decide.” *Id.*, at 235, 28 S. Ct. 641, 52 L. Ed. 1039. That time-honored rule controls here. The Georgia judgment appears on its face to have been issued by a court with jurisdiction, and there is no established Georgia law to the contrary. It follows that the Alabama Supreme Court erred in refusing to grant that judgment full faith and credit.

136 S. Ct. 1017, *1022; 194 L. Ed. 2d 92, **97; 2016 U.S. LEXIS 1653, ***8

The petition for writ of certiorari is granted. The judgment of the Alabama Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

References

U.S.C.S., Constitution, Article IV, § 1

18 Moore's Federal Practice §§130.01, 130.04 (Matthew [***9] Bender 3d ed.)

L Ed Digest, Judgment §§357, 362

L Ed Index, Full Faith and Credit

Federal constitutional principles applicable to award or modification of child custody or visitation--Supreme Court cases. 147 L. Ed. 2d 1095.

Rights of, and validity of provisions concerning or affecting, homosexuals, under Federal Constitution--Supreme Court cases. 134 L. Ed. 2d 1047.

Divorce decrees and full faith and credit. 14 L. Ed. 2d 917.

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NATIONAL CENTER FOR LESBIAN RIGHTS

Protecting Your Family After Marriage Equality: What You Need To Know

We have seen unprecedented advances in equality for same-sex couples now that we have marriage equality nationwide. In addition to the dignity and respect that marriage equality provides for our relationships, marriage provides tremendous legal and financial protections to same-sex spouses.

However, marrying does not provide all the protections your family needs to be legally secure – there are very important legal steps that all same-sex spouses and transgender spouses need to take to ensure that their families are protected.

1. Protect your children with an adoption or parentage judgment

We still strongly recommend that all non-biological parents get an adoption or judgment from a court recognizing that they are a legal parent, even if they are married and even if they are listed as a parent on the birth certificate. Having your name on the birth certificate does not guarantee protections if your legal parentage is challenged in court.

Being married to a birth parent does not automatically mean your parental rights will be fully respected if they are ever challenged. There is no way to guarantee that your parental rights will be respected by a court unless you have an adoption or court judgment. Without this, you could lose any right to your child if something happens to the other parent or if you break up.

For example, if the birth parent dies and you are not recognized as a parent, your child could end up in foster care or with a relative instead of being able to stay with you. If you use a known donor, depending on your situation, the donor could be considered to be a legal father unless you terminate any rights he may have in an adoption. If you end up receiving Medicaid or other government benefit, the government could bring a court case to make the donor a legal father and require him to pay for the benefit your child receives.

Spending a little time and money doing an adoption or getting a parentage judgment now can save you from being separated from your child and from spending thousands of dollars in legal fees later. For more information about how to get an adoption or parentage judgment in your state, contact NCLR.

If you have any questions about marriage and family protections, or for more information about legal rights in your state, contact NCLR at www.ncrlrights.org/gethelp or 1.800.528.6257



2. Protect your and your spouse's property and decisionmaking with estate planning

All married couples should make sure that they have planned for what will happen to their spouse if one of them passes away through estate planning. This could be through a will or trust, or designating your spouse as a beneficiary on your financial accounts.

You should also fill out healthcare directives. See www.caringinfo.org for blank healthcare directives in your state.

3. Protect your spouse's ability to obtain public benefits

If you or your spouse are older, or if one of you has a disability, make sure you understand your rights under Social Security and Medicare. Your spouse may be able to receive more benefits as your spouse than on his or her own.

If you think you may be able to get spousal Social Security benefits, you should apply as soon as possible because the start date for these benefits is tied to when you apply.

If you have any questions about marriage and family protections, or for more information about legal rights in your state, contact NCLR at www.nclrights.org/gethelp or 1.800.528.6257



VIRGINIA LGBTQ FAMILY LAW

A Resource Guide for LGBTQ-Headed Families
living in Virginia

October 2017

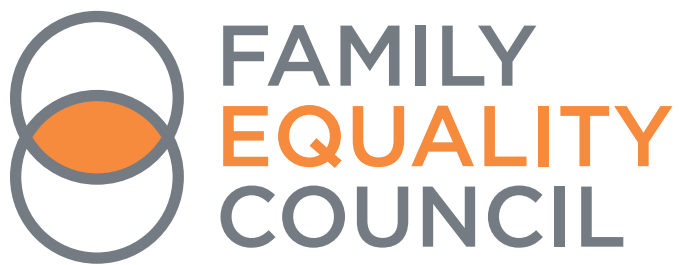


TABLE OF CONTENTS

INTRODUCTION.....	2
RELATIONSHIP RECOGNITION.....	3
Federal Benefits After <i>United States v. Windsor</i> and <i>Obergefell v. Hodges</i>	4
CHILDREN AND PARENTAGE.....	6
Adoption.....	7
Joint Adoption.....	7
Second-Parent Adoption.....	7
Stepparent Adoption.....	8
Surrogacy, Assisted Reproduction and Artificial Insemination.....	9
Birth Certificates.....	11
Applying for a Social Security Number and Card for a Child.....	12
Applying for a Passport for a Child	13
Employment	14
State Law.....	14
Federal Law	15
Company Policies.....	16
Housing	17
State Law.....	17
Federal Law	17
Public Accommodations	18
State Law.....	18
Federal Law	18
SCHOOL POLICIES AND ANTI-BULLYING	19
State Law	19
Federal Law.....	20
HEALTHCARE.....	21
Federal Law.....	21
FAMILY AND/OR PARENTING LEAVE	23
CHANGES OF NAME AND GENDER.....	24
HATE CRIMES PROTECTIONS.....	25
RECOMMENDED LEGAL DOCUMENTS FOR SAME-SEX COUPLES	27
Last Will and Testament	27
Advance Directive For Healthcare.....	28
General Power Of Attorney.....	28
Domestic Partnership Agreement.....	29
Co-Parenting Agreement.....	29

INTRODUCTION

This guide was drafted by Family Equality Council, in collaboration with Equality Virginia. It addresses many of the legal rights and issues that affect LGBTQ families currently living in Virginia. As LGBTQ equality advances across the nation, there are still significant gaps in the rights of LGBTQ individuals and their families, especially at the state level. Virginia has very few laws in place to protect LGBTQ families from discrimination and equal access to education, employment, housing, healthcare, and public accommodations. In this type of environment, it is important to understand what the law is in each area and how best to protect your family.

DISCLAIMER

This handbook is not intended to be legal advice but an overview of the current state of LGBTQ-family law in Virginia. The law is changing quickly and dynamically, so it is important to consult an attorney or contact the authors to discuss the details of your particular situation and to ensure that information provided herein is still accurate.



RELATIONSHIP RECOGNITION

In 2004, the Virginia legislature enacted the Affirmation of Marriage Act, which prohibited civil unions in Virginia and stated that a civil union entered into in another state was void in Virginia.¹ In 2006, Virginia voters approved an amendment to the Virginia Constitution that defined marriage as a union solely between one man and one woman.²

In 2013, after the United States Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA), which barred same-sex couples from being recognized as spouses under federal law,³ a U.S. District Court judge in Virginia ruled that the marriage amendment in Virginia's Constitution, as well as the Affirmation of Marriage Act to the extent that it prohibited a person from marrying a person of the same gender, violated the U.S. Constitution.⁴ A federal appeals court affirmed this decision in July 2014,⁵ and the U.S. Supreme Court denied review of the case.⁶ As such, the Commonwealth of Virginia began issuing marriage licenses to

same-sex couples on October 6, 2014.⁷ Civil unions are still not recognized in Virginia, however.

Nationwide recognition of marriages of same-sex couples came in June 2015 with the U.S. Supreme Court's ruling in *Obergefell v. Hodges*.⁸ *Obergefell* not only requires all states in the U.S. to issue marriage licenses to same-sex couples, but also requires them to recognize marriage licenses issued in another state.⁹

Although Virginia's constitutional and statutory language prohibiting marriage equality are void and unenforceable, the laws remain in the Virginia Constitution and the Virginia State Code. Legislative efforts to remove the language have failed for the past three years.¹⁰

In 2016 and 2017, the Virginia legislature attempted to pass laws stating that no person could be required to participate in the solemnization of any marriage or subject to any penalty by the Commonwealth "solely on account of such person's belief, speech, or action in

1 H.B. 751 (2004)(enacted); Va. Code § 20-45.3.

2 Ballot Question 1 (voted on Nov 7, 2006); Virginia Constitution, Article I §15-A; Va. Code § 20-45.2.

3 *United States v. Windsor*, 133 S.Ct 2675 (2013).

4 *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va 2014).

5 *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014).

6 *Schaefer v. Bostic*, 135 S.Ct. 308 (2014).

7 Commonwealth of Virginia, Office of the Attorney General, Statement of Attorney General Mark Herring on Marriage Equality in Virginia (October 6, 2014): <https://www.oag.state.va.us/index.php/media-center/news-releases/341-october-6-statement-of-attorney-general-herring-on-marriage-equality-in-virginia>.

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

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

10 H.B. 538 (2017); S.B. 2 (2017); H.B. 5 (2016); S.B. 10(2016); S.B. 214 (2015); S.B. 682 (2015).

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A Resource Guide for LGBTQ-Headed
Families

accordance with a sincerely held religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman."¹¹ Although the Governor of Virginia vetoed both laws, ministers have the right to refuse to marry a couple based on their religious beliefs under the state Religious Freedom Restoration Act.¹²

Federal Benefits After *United States v. Windsor* and *Obergefell v. Hodges*

As discussed above, in 2013, the U.S. Supreme Court, in *United States v. Windsor*, found Section 3 of DOMA unconstitutional, overturning the law that denied federal marriage benefits to married same-sex couples. This case laid the foundation for marriage equality nationwide, which was won two years later.

In 2015, the Supreme Court found in *Obergefell v. Hodges* that same-sex couples have a fundamental right to marry under the Constitution, mandating that same-sex couples be permitted to marry and have their marriages recognized throughout the U.S.¹³ Following *Obergefell*, all federal marriage benefits have been extended to married same-sex couples nationwide. Such benefits include, but are not limited to, Social Security and Veterans Administration benefits, all federal tax benefits, health insurance and retirement benefits for same-sex spouses of all federal employees, and spousal benefits for same-sex spouses of military service members.

¹¹ H.B. 2025 (2017); S.B. 41 (2016).

¹² Va. Code § 57-2.02.

¹³ *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

IMPORTANT:

Because marriages of same-sex couples are now recognized nationwide, married couples living in Virginia should be able to access all federal benefits that are attendant to marriage. Please alert the authors if you find such benefits have been denied to you as a result of the agency failing to recognize your marriage.

For more information on how to access federal marriage benefits please see the post-*Obergefell* Fact sheets at:

<https://marriageequalityfacts.org>





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CHILDREN AND PARENTAGE

LGBTQ people and same-sex couples form families in various ways. Some have children from prior different-sex or same-sex relationships. Some LGBTQ people are single parents by choice. Some same-sex couples adopt or use assisted reproductive technologies to build their families together. While there is much progress to be made in Virginia with regard to parental recognition for LGBTQ individuals and couples, there are some state rules and statutes in place that recognize and reflect the evolving landscape of the modern family make-up.

All same-sex couples raising LGBTQ children should keep copies of the following documents easily accessible:

- Adoption or Order of Parentage decree
- Birth certificate
- Guardianship or Custody Order or agreement
- Co-parenting agreement
- Marriage License
- Medical Powers of Attorney

Please consult an attorney experienced in LGBTQ law, or the authors, if you experience discrimination from state agencies in recognizing your family relationships on the basis of your marriage.

Likewise, if you are an LGBTQ person or same-sex couple thinking about fostering and/or adopting children either from the public child welfare system or through private adoption, it is critical that you hire a Virginia adoption attorney who has experience working with LGBTQ people and couples. It is not enough to simply hire an experienced family law attorney. There are issues unique to LGBTQ families that can, and should, only be managed by an attorney with particular experience and expertise in this area of the law. If you are unsure where to find an experienced LGBTQ family law attorney, please contact Family Equality Council (www.familyequality.org), and we will do our best to help you find one.

ADOPTION

Under Virginia law, any single unmarried adult or married couple who resides in Virginia may petition to adopt.¹⁴ Nothing in Virginia law or regulations explicitly prohibits LGBTQ individuals or couples from adopting, but there also is no explicit statutory protection against discrimination. In 2012, the Virginia state legislature passed a so-called “conscience clause” law, providing that “no private child-placing agency shall be required to perform, assist, counsel, recommend, consent to, refer, or participate in any placement of a child for foster care or adoption when the proposed placement would violate the agency's written religious or moral convictions or policies.”¹⁵ In effect, the law permits private child-placement agencies to discriminate against LGBTQ prospective foster and adoptive parents and youth in their care based on any written “moral” or religious policies or beliefs of the agency. For this and other reasons, it is advisable to contact an adoption attorney experienced in LGBTQ family law in Virginia and to engage with foster and adoption agencies who are welcoming and affirming to LGBTQ people and couples.

Joint Adoption

As a general matter, a married individual must petition to adopt jointly with their spouse.¹⁶ After marriage equality was recognized in Virginia in 2014, the Virginia Department of Social Services released

a bulletin informing local social services divisions that married couples of the same gender can legally adopt jointly and that “any married couple is a married couple for purposes of adoptive placements.”¹⁷ Moreover, since marriage equality is recognized nationwide, same-sex spouses must be permitted to adopt under the same terms and conditions as different-sex married couples.

Virginia law by statute at present does not permit unmarried couples to petition to adopt jointly, whether same-sex or different-sex.

Second-Parent Adoption

Second-parent adoption is the adoption of a child by an additional parent who is not married to the legal parent of the child. In a second-parent adoption, the additional parent can be recognized as such without the first parent losing any parental rights, and the child is entitled to the benefits of two legal parents. Virginia law does not currently allow unmarried couples to obtain a second-parent adoption in Virginia.¹⁸ However, validly-granted second-parent adoptions issued in other states should be recognized in Virginia.¹⁹

¹⁴ Va. Code § 63.2-1201; Va. Code § 63.2-1225.

¹⁵ Va. Code § 63.2-1709.3.

¹⁶ Va. Code § 63.2-1201.

¹⁷ Virginia Department of Social Services Bulletin re Impact of Same-Sex Court Ruling on Adoption and Foster Care (October 10, 2014), <https://governor.virginia.gov/newsroom/newsarticle?articleId=6827> (last visited Sept 26, 2017).

¹⁸ Va. Code § 63.2-1241.

¹⁹ *V.L. v E.L.*, 136 S.Ct. 1017 (2016).

An adoption decree is the single best irrefutable and undeniable proof of parentage. We strongly recommend that same-sex couples with children ALWAYS get an adoption decree that recognizes both parents as legal parents, even if you are married and appear on the birth certificate.

Stepparent Adoption

Married same-sex couples can ensure that both parents are legally recognized by obtaining an adoption decree through the stepparent adoption procedure. Note however that the statute itself does not use the term “stepparent” at all. Stepparent adoption is the adoption of a child by the spouse of the child's legal parent.²⁰ A child can be adopted by a stepparent so long as the child only has one legal parent. This can apply to LGBTQ couples in two scenarios. First, if a married couple plans the pregnancy and conceives the child through the use of assisted reproductive technology, such as sperm, egg, or embryo donation (see assisted reproductive technology section below), the biological parent may be considered to be the sole legal parent. While married spouses should be entitled to a parental presumption regardless of gender (see parental presumption section below), it is strongly advised that the other spouse obtain an adoption decree recognizing them as a legal parent. This can be done through the stepparent adoption procedure, and ensures that both parents are considered the legal parents. The second scenario arises if one of the spouses already has a child when the couple is married and is

that parent is the child's only legal parent. In this scenario, after the couple marries, the spouse of the legal parent may adopt the child as a stepparent and share equally in the rights and responsibilities of raising the child.

In Virginia, individuals petitioning to adopt as a stepparent must petition jointly with the spouse who is the legal parent to indicate the spouse's consent.²¹ Since the recognition of marriage equality, a spouse of the same gender as the legal parent should be entitled to adopt under this provision just as a spouse of a different gender would. However, as stated above, there are no explicit statutory protections in Virginia preventing discrimination. As such, consultation with a Virginia attorney experienced in working with LGBTQ families is highly encouraged when proceeding with a stepparent adoption. While typically most same-sex married couples can do a stepparent adoption without any issue, there are still some jurisdictions and/or judges that will not proceed directly to a final order but instead will require a “report of investigation” by the local department of social services which requires a background investigation and at least one visit to the adoptive parents' household. Also, while there is

²⁰ Va. Code § 63.2-1241.

²¹ Va. Code § 63.2-1241.

nothing in the statute that requires that a hearing take place, a very small number of courts will mandate a hearing.

Parental Presumption

Parental presumption is the idea that, when a married woman gives birth, her spouse is the other legal parent. State laws pertaining to parental presumption vary throughout the U.S., but historically they applied exclusively to different-sex spouses and many were written with gendered language. However, with nationwide marriage equality, parental presumption laws should be applied equally to married same-sex couples.

In Virginia, a marriage creates a presumption of paternity. Using gender-specific terminology, the Virginia law provides that a man is presumed to be the father of a child if he and the mother of the child were married in the ten months preceding the birth of the child.²² Since the recognition of marriage equality nationwide, the statute has not been updated and there are no court decisions in Virginia specifically interpreting that provision. While Virginia's parental presumption should apply equally to all married couples, the best way for a same-sex couple to ensure that both parents' rights will be legally recognized and respected throughout the U.S. is to obtain an adoption decree or Order of Parentage or Order of Parentage with stepparent adoption.

²² Va. Code § 63.2-1202.

SURROGACY, ASSISTED REPRODUCTION AND ARTIFICIAL INSEMINATION

Assisted reproductive technology (ART) is the use of medical technology to assist with pregnancy or childbirth and includes methods such as in vitro fertilization or use of an egg donor, sperm donor, embryo donor, and/or a surrogate carrier. Assisted conception is governed by state laws in Virginia, although the laws have not been updated since the recognition of marriage equality.²³

Virginia law defines "assisted conception" as "a pregnancy resulting from any intervening medical technology, whether in vivo or in vitro." The statute governs ART including, but not limited to, artificial insemination by donor, in vitro fertilization, and embryo transfer.²⁴ The statute is specific to married intended parents and uses gender-specific terminology, but with the recognition of marriage equality, it should apply equally to all married couples, regardless of gender.

Virginia's statute on the "Status of Children of Assisted Conception" expressly defines a "donor" as "an individual, other than a surrogate, who contributes the sperm or egg used in assisted conception"²⁵ and further states that a "donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the

²³ Va. Code §§ 20-156 *et seq.*

²⁴ Va. Code § 20-156.

²⁵ Va. Code §20-156.

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gestational mother.”²⁶ However, it is essential that anyone using donor sperm or a donor egg have a very clear donor agreement or release in order to properly extinguish any parental rights of the donor. It also is critical that the parties use an “intervening medical technology” and if a single female or same-sex female couple are using an insemination kit purchased at a drug store they clarify in the donor agreement that they consider that to be an “intervening medical technology.” One circuit court in Roanoke in the case of *Bruce v. Boardwine*, 88 Va. Cir. 218 (Roanoke City, May 6, 2014), affirmed on appeal, 64 Va. App. 623, 770 S.E.2d 774 (2015), ruled that the use of a “turkey baster” did not constitute an intervening medical technology. The case was upheld on appeal by the Virginia Court of Appeals. Notably, the parties in that case also did not have a donor agreement in place.

It is equally important for an individual who contributes a gamete (egg or sperm) with the intention of being a parent and not a donor (such as when one lesbian partner contributes her egg to her partner to carry or when an unmarried male contributes his sperm to be combined with donor egg and carried via a gestational carrier) to execute a “non-donor agreement.” This ensures that the parties’ intent is clear that the person intends to be a parent and not merely a donor.

For same-sex female couples using donor sperm, the Virginia Department of Vital Records issued a form after October 2014 that can be signed upon birth placing

²⁶ Va. Code §20-158(A)(3).

both mothers on the birth certificate. However, this form has no foundation clearly set out in case law or statute (although the form refers to Virginia Code section 32.1-261(A)(2) addressing issuance of a new birth certificate upon proof of legitimization, Virginia’s Constitution Article I, Section 15-A on Marriage still says marriage is only as between a man and a woman). Accordingly, it is strongly recommended that the couple also do a stepparent adoption to secure the child’s legal parentage by court order. Parties should not rely solely on the issuance of a birth certificate, as it is an administrative document and can be challenged.

While Virginia law also permits surrogacy (the use of a surrogate to carry and deliver a child for intended parent(s)), it states that a “gestational mother” (surrogate) is presumed to be the child’s mother, and her spouse, if any, is presumed to be the father.²⁷ To remove that presumption and establish intended parents’ legal rights as parents, the intended parents must either: (1) enter into a court-approved written surrogacy contract prior to the pregnancy, which is a cumbersome and expensive process that requires home studies and legal fees before a pregnancy can be attempted, and return to court for a second court order after the birth (a process that is rarely ever used);²⁸ or (2) enter into a surrogacy contract that is not court-approved, and use a post-birth administrative process in which the intended parents and spouse of the gestational carrier sign the birth certificate

²⁷ Va. Code § 20-158.

²⁸ Va. Code § 20-160.

amendment paperwork immediately after birth and the gestational carrier signs three days after birth.²⁹ However, because the statute on the Status of Children of Assisted Conception still refers to intended parents as a married man and a woman, it is essential for same-sex couples using a gestational carrier to obtain an Order of Parentage for the genetic parent and a stepparent adoption for the spouse/non-biological parent so that both parents are recognized as legal parents (via court order) and are listed on the birth certificate. Relying on the administrative process alone to obtain a birth certificate with both parents' names is not enough, especially given that the statute has not been updated to expressly include same-sex couples. Consultation with a Virginia attorney who specializes in surrogacy law and LGBTQ issues is essential.

While Virginia's surrogacy statute does not contemplate a single intended parent using a gestational carrier, there is no law prohibiting a single person from doing so. Such arrangements are done as non-court approved contracts outside of Virginia's surrogacy statute. In such instances, so long as the single parent is the genetic parent, then he or she must use Virginia's parentage statutes³⁰ to obtain a court order declaring the single parent as the sole parent and declaring that the gestational carrier (and her spouse if applicable) are not the parents. Then a birth certificate naming only the single genetic parent is issued based on an order of parentage.

²⁹ Va. Code § 20-162.

³⁰ Va. Code § 20-49.1 et seq.

The Virginia assisted conception statute is very complex and must be interpreted in conjunction with Virginia's parentage and birth certificate issuance statutes. This area of law is evolving in Virginia and across the U.S. Therefore, it is imperative that any individual or couple who is considering assisted conception consult with a Virginia attorney who is well-versed in ART law, experienced in working with LGBTQ individuals, same-sex couples, and surrogacy programs, and knowledgeable about the process for establishing the parental rights of the intended parent(s).

An adoption decree is irrefutable proof of parentage and is valid throughout the country. As such, regardless of whether a surrogacy agreement is in place and the name(s) of the intended parent(s) appear on the birth certificate, it is strongly recommended to consult with an attorney about also petitioning for an adoption decree for a child conceived through ART.

BIRTH CERTIFICATES

Virginia law uses gendered language for the purposes of the birth certificate, but, after marriage equality was recognized in Virginia in 2014, the Virginia Department of Health issued a letter informing hospitals that, when there are two female spouses in a marriage, both spouses can be listed on a birth certificate when one is the gestational mother.³¹ The letter did not specify the

³¹ Commonwealth of Virginia, Department of Health, Letter from Director Rainey (Jan 22, 2015), <https://acluva.org/sites/default/files/wp-content/uploads/2015/02/RaineyLettertoHospitals20150122.pdf>

procedure for two male spouses. In June 2017, the U.S. Supreme Court held that states cannot discriminate against same-sex couples when listing both spouses on a birth certificate. In *Pavan v. Smith*, the U.S. Supreme Court expressly reiterated that equal access to birth certificates is one of the many “rights, benefits, and responsibilities” associated with civil marriage.³² Accordingly, states cannot discriminate against same-sex spouses with regard to the naming of each spouse on a child's birth certificate, and same-sex parents in Virginia are entitled to the same parental presumption enjoyed by different-sex parents.

As a birth certificate is not a Court Order and is only evidence of what the parties intended, it is still recommended that same-sex couples petition for an adoption decree as soon as possible, to ensure that both parents are legally recognized.

New birth certificates must be issued following an adoption, so a same-sex parent who is not already listed on the birth certificate should be listed after completing an adoption of a child.³³

To update a child's birth certificate, send a request to the Virginia Office of Vital Records. Details on how to do so are available at: <http://www.vdh.virginia.gov/vital-records>

APPLYING FOR A SOCIAL SECURITY NUMBER AND CARD FOR A CHILD

To apply for a Social Security Number and Card for a child, the Social Security Administration (SSA) requires a number of different documents, personal information about the parent applying for the Card or Number, the child, and any other legal parent to the child, and a completed SS-5 application form.

These documents may be submitted to the SSA via letter or in person at a local SSA office, which can be found through this link <https://secure.ssa.gov/apps6z/FOLO/fo001.jsp> Two same-sex parents may be listed on the application for a Social Security Card or Number. However, only parents listed on the child's birth certificate, or on a court-ordered adoption decree, are permitted to be included on the application.

For more information on the application process, please see Family Equality Council's FAQ http://www.familyequality.org/get_informed/advocacy/know_your_rights/ssa_faqs, visit the SSA website at <https://www.ssa.gov/ssnumber>, or call the SSA at 1-800-722-1213 or 1-800-325-0778. If difficulties arise, please contact Family Equality Council.

³² *Pavan v. Smith*, No. 16-992 (June 2017).

³³ 12 Va. Admin. Code § 5-550-280.

APPLYING FOR A PASSPORT FOR A CHILD

To apply for a passport for a child, the State Department requires documentary evidence, a completed DS-11 form, a photograph of the child, and personal information about the parent applying for the passport, the child, and the child's other legal parent, if any. These documents must be submitted to the State Department in person at the nearest accepted facility or regional passport agency, listed here: <https://iafdb.travel.state.gov>

The required materials are listed here: <http://travel.state.gov/content/passports/english/passports/under-16.html>

Two same-sex parents may be listed on the application for a child's passport. Only parents listed on the child's birth certificate, or on a court-ordered adoption decree, are permitted to be included on the application. However, if the adoptive

(or legal) parent of the child is unavailable, the Department of State permits a non-adoptive parent who stands *in loco parentis* to the child to complete the DS-11 form and application. *In loco parentis* means an adult with day-to-day responsibilities to care for and financially support a child but with whom the child does not have a biological or legal relationship.

Questions about the application process and acceptable materials can be directed to the National Passport Information Center at 1-877-487-2778. The State Department website also provides helpful information at <http://travel.state.gov>.

Family Equality Council also maintains an FAQ on applying for a child's passport, available at this link http://www.familyequality.org/get_informed/advocacy/know_your_rights/passport_faq, or contact Family Equality Council for assistance if problems arise in obtaining the passport.

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A Resource Guide for LGBTQ-Headed
Families



NONDISCRIMINATION PROTECTIONS

There are currently no federal laws that explicitly prohibit discrimination of LGBTQ people in employment, housing, and public accommodations. Existing federal civil rights laws have been interpreted to provide some limited protections in housing, employment, education and even in health care, but without explicit and fully inclusive federal protections against discrimination based on sexual orientation and gender identity, LGBTQ people and their families remain vulnerable under the law.

Unfortunately, Virginia state law offers no explicit protections against discrimination based on sexual orientation or gender identity discrimination in these areas. Some localities have adopted Human Rights Codes that include protections from discrimination on the basis of sexual orientation and/or gender identity. These localities include some of the more populated cities and counties in Virginia, such as Alexandria,³⁴ Charlottesville,³⁵ and Arlington County.³⁶ Accordingly, LGBTQ individuals in these counties who are discriminated against in employment, housing, public accommodations, or education may file a complaint with the locality's Human Rights Commission.

³⁴ City of Alexandria Code of Ordinances, Title 12, Chapter 4.

³⁵ City of Charlottesville Code of Ordinances, Chapter 2, Article XV.

³⁶ Arlington County Code, Chapter 31, Human Rights.

EMPLOYMENT

State Law

Even with the arrival of nationwide marriage equality, LGBTQ people are at risk of being outed at work by simply filing an amended W-4, leading to discrimination in the workplace or even the loss of a job. Unfortunately, the Commonwealth of Virginia offers no state law prohibiting employers from discriminating against an employee on the basis of sexual orientation and gender identity. In the absence of statutory protection, the first executive order signed by Virginia Governor Terry McAuliffe when he began his term in 2014 prohibits discrimination against state employees on the basis of sexual orientation and gender identity.³⁷ Thus, LGBTQ employees of the state may report allegations of sexual orientation- and gender identity-based discrimination to the Office of Equal Employment Opportunity in Virginia's Department of Human Resource Management. The complaint must be filed within 180 days of the last alleged discriminatory act, and the complaint form and contact information to submit the form are available at this website <http://www.dhrm.virginia.gov/equal-employment-opportunity/complaintofdiscrimination>.

Virginians who work for companies that contract or subcontract with the

³⁷ Commonwealth of Virginia, Office of the Governor, Executive Order Number One (2014), Equal Opportunity (Jan 11, 2014).

Commonwealth's Executive Branch receive protection against discrimination based on sexual orientation and gender identity under a 2017 Executive Order signed by Governor McAuliffe. The Order states that, in contracts valued over \$10,000, all Virginia Executive Branch entities must include a prohibition against discrimination on the basis of race, sex, color, national origin, religion, sexual orientation, gender identity, age, political affiliation, disability, or veteran status in the contractor's employment and subcontracting practices and its delivery of goods and services.³⁸

Federal Law

While there is no explicit federal law that bars discrimination against LGBTQ people in the workplace, the definition of “sex” in Title VII of the Civil Rights Act of 1964 has been interpreted by some courts to provide employment protections for LGBTQ people. The Equal Employment Opportunity Commission (EEOC) hears and investigates complaints of employment discrimination under Title VII and looks into claims against all private employers, state and local governments, federal government agencies, employment agencies, and labor unions, as long as they have fifteen or more employees or members.

In 2012, the EEOC ruled in *Macy v. Holder* that discrimination against a transgender woman was discrimination under Title VII's prohibition of discrimination based on

³⁸ Commonwealth of Virginia, Office of the Governor, Executive Order Number Sixty-One (2017), Executive Action to Ensure Equal Opportunity and Access for All Virginians in State Contracting and Public Services (Jan 5, 2017).

sex.³⁹ In *Veretto v. US Postal Service*⁴⁰ and *Castello v. US Postal Service*,⁴¹ the EEOC held that employment discrimination on the basis of sexual orientation violated prohibitions of sex-based discrimination because it constituted discrimination based on sex-stereotypes. In 2015, the EEOC strengthened the protections for those who may face discrimination on the basis of sexual orientation by ruling in *Complainant v. Foxx*⁴² that claims of discrimination based on sexual orientation inherently amount to claims of sex discrimination and are therefore actionable under Title VII.⁴³ These EEOC decisions, while not binding to courts, reflected the EEOC's view that LGBTQ individuals are protected under Title VII and may file a claim of employment discrimination utilizing the law's inclusion of “sex” as a protected class. In 2017, in *Hively v. Ivy Tech Comm. College*, a federal appellate court issued a binding decision citing with approval the EEOC's conclusions in *Complainant v. Foxx*, thus providing strong legal precedent for reading Title VII as including LGBTQ employees as a protected class.⁴⁴

Victims of discrimination on any protected basis, including sexual orientation and gender identity, must file a Charge of Discrimination with a local EEOC office

³⁹ No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

⁴⁰ No. 0120110873 (E.E.O.C. Jul. 1, 2011).

⁴¹ No. 0120111795 (E.E.O.C. Dec. 20, 2011).

⁴² *Complainant v. Foxx*, No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015).

⁴³ No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 16, 2015).

⁴⁴ *Hively v. Ivy Tech Comm. College*, 853 F.3d 339 (7th Cir. 2017).

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A Resource Guide for LGBTQ-Headed
Families

prior to filing a lawsuit in court alleging discrimination. The EEOC offices serving Virginia can be found at <https://www.eeoc.gov/field>.

Generally, the Charge of Discrimination must be filed within 180 days of each instance of discriminatory treatment. To file a complaint based on sexual orientation or gender identity, the complainant must list the basis for the claim as discrimination on the basis of “sex,” as this is the existing basis that the EEOC and some courts have linked to sexual orientation and gender identity. More about the EEOC process and a claimant's rights and responsibilities after filing a claim with the EEOC is available at this website: <http://www.eeoc.gov/employees/charge.cfm>. Federal employees and job applicants are subject to a different timeline for making a claim (typically 45 days) and procedures for filing, which are available here: http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm

Virginians working for companies that contract with the federal government have access to additional protections against discrimination in employment. These protections stem from a 2014 Executive Order that prohibits federal contractors from discriminating against current or prospective employees on the basis of sexual orientation or gender identity.⁴⁵

⁴⁵ Executive Order 13672 (July 21, 2014). On January 31, 2017, President Trump issued a statement that this Executive Order will remain intact during his presidency. <https://www.whitehouse.gov/the-press-office/2017/01/31/president-donald-j-trump-will-continue-enforce-executive-order>.

Contractors who do business with the federal government employ 20% of American workers, all of whom are now covered by non-discrimination protections under this Order. LGBTQ individuals who have been the victim of discrimination by an employer that contracts with the federal government, can file a complaint through the U.S. Department of Labor Office of Federal Contract Compliance Programs. Information about the complaint process is available here: <http://www.dol.gov/ofccp/regs/compliance/pdf/pdfstart.htm>

Company Policies

Many employers, especially those that operate in multiple states, have enacted their own internal non-discrimination policies that prohibit discrimination against LGBTQ employees. While these policies may not be legally binding, they can often give an employee some recourse where there would otherwise be none. A company's non-discrimination policy should be available in the company's employee handbook or through the human resources department, and it is always important to be familiar with it and understand the rights and protections it affords.

Any person who has been or may have been the victim of sexual orientation- or gender identity-based discrimination in the workplace should contact an attorney familiar with LGBTQ employment law.

HOUSING

State Law

Virginia state law offers no protection against discrimination on the basis of sexual orientation or gender identity in housing or financial assistance. Virginia's Fair Housing Law provides for "fair housing throughout the Commonwealth, to all its citizens, regardless of race, color, religion, national origin, sex, elderliness, familial status, or handicap."⁴⁶ Sexual orientation and gender identity are not listed as protected classes of people, so Virginia's fair housing provisions do not explicitly extend to the LGBTQ community in Virginia. As mentioned previously, some localities have passed human rights ordinances that prohibit discrimination in housing on the basis of sexual orientation and/or gender identity, so LGBTQ individuals discriminated against in those localities may seek recourse through their local Human Rights Commission.

Federal Law

The federal Fair Housing Act, which was enacted as Title VIII of the Civil Rights Act of 1968 and is enforced by the Department of Housing and Urban Development (HUD), does not explicitly prohibit discrimination against LGBTQ people and their families. However, an LGBTQ person experiencing discrimination on the basis of sexual orientation or gender identity may still be covered by the Fair Housing Act on the basis of such discrimination constituting discrimination on the basis of "sex," similar

to the employment context.

In 2012, HUD issued the "Equal Access Rule," which prohibits discrimination on the basis of sexual orientation or gender identity by any housing or service provider that receives funding or insurance from HUD.⁴⁷ It also prohibits lenders from determining a borrower's eligibility for Fair Housing Authority (FHA) insurance on the basis of sexual orientation or gender identity. For example, any landlord receiving funding through HUD is prohibited from refusing to rent, offering unequal and inflated rental prices, or mistreating potential renters based on their sexual orientation, gender identity, or HIV/AIDS status. Further, any lender or operator of HUD-assisted housing is prohibited from inquiring as to the sexual orientation or gender identity of an applicant, and is barred from using such criteria in assessing an application. A violation of this rule may result in HUD pursuing a number of remedies, including sanctions against the violator. HUD allows individuals to submit housing discrimination complaints by telephone at 1-800- 955-2232, by mail, or online http://portal.hud.gov/hudportal/HUD?src=/topics/housing_discrimination. The HUD field offices in Washington DC and Richmond service Virginians. Contact information is available at: <https://www.hud.gov/states/virginia/offices>. To learn more about filing a complaint, as well as the process for filing a lawsuit, please read this page: http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/complaint-process

⁴⁷ Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, Final Rule (2012); 24 CFR § 5.106.

⁴⁶ Va. Code § 36-96.1.

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A Resource Guide for LGBTQ-Headed
Families

PUBLIC ACCOMMODATIONS

State Law

Virginia law offers no explicit protection for LGBTQ people in public accommodations. Public accommodations are generally defined as entities, both public and private, that are open to or offer services for the general public. Examples include retail stores, hotels, restaurants, educational institutions, hospitals, public parks, libraries, and recreational facilities, but private clubs and religious institutions are generally exempt from this definition.

The Virginia Human Rights Act (VHRA) prohibits "unlawful discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability, in places of public accommodation, including educational institutions and in real estate transactions."⁴⁸ The VHRA does not list sexual orientation or gender identity as protected classes of people. However, in May 2016, the Attorney General of Virginia issued an advisory opinion interpreting the VHRA, concluding that there is a "strong argument" that sexual orientation and gender identity discrimination constitute discrimination "based on" sex.⁴⁹ The Supreme Court of Virginia has not considered the issue, however, and the Virginia Attorney General's advisory opinion is not binding on Virginia courts.

48 Va. Code § 2.2-3900.

49 VA Attorney General Advisory Op. No 15-070 (May 10, 2016), https://www.oag.state.va.us/files/Opinions/2016/15-070Messrs_GarrettPlumLaRock.pdf.

Additionally, in 2017, the Governor of Virginia issued an Executive Order prohibiting state Executive Branch employees from discriminating on the basis of sexual orientation and gender identity in the provision of public services.⁵⁰ This encompasses all state employees offering services to the general public at entities such as educational institutions, museums, the department of motor vehicles, and any state government building.

Federal Law

Federal public accommodations protection provisions can be found in Title II of the Civil Rights Act of 1964 and Title III of the Americans with Disabilities Act of 1990. Unfortunately, neither law provides express protections based on sexual orientation or gender identity. However, in 1998, the Supreme Court ruled that being HIV-positive is a physical disability covered by the Americans with Disabilities Act, even if the infection has not yet progressed to the symptomatic phase.⁵¹ Businesses that hold themselves open to the public (restaurants, stores, hotels, etc.) are therefore prohibited from refusing service or business to individuals because they are HIV-positive.

50 Commonwealth of Virginia, Office of the Governor, Executive Order Number Sixty-One (2017), Executive Action to Ensure Equal Opportunity and Access for All Virginians in State Contracting and Public Services (Jan 5, 2017).

51 *Bragdon v. Abbott*, 524 U.S. 624 (1998).

SCHOOL POLICIES AND ANTI-BULLYING

STATE LAW

As with employment, housing, and public accommodations, the Commonwealth of Virginia offers no state-level protections against discrimination on the basis of sexual orientation and gender identity for LGBTQ students and employees in the public education system. Without explicit statutory language or authoritative decisions from the state or appellate courts in Virginia, LGBTQ students and public school employees remain vulnerable to discriminatory actions.

With the absence of state-level protection, some school boards and localities have passed non-discrimination ordinances that protect LGBTQ students and employees from discrimination in education based on sexual orientation and gender identity. Currently, these protections cover over 25% of public school students and employees, despite the lack of state-level protections.⁵²

All school districts in Virginia are required to implement policies and procedures that prohibit bullying, but there are no specific provisions regarding bullying of LGBTQ students and families.⁵³ Bullying in Virginia is defined as "any aggressive and unwanted behavior that is intended to harm, intimidate, or humiliate the victim; involves

a real or perceived power imbalance between the aggressor or aggressors and victim; and is repeated over time or causes severe emotional trauma," and the statute specifically includes cyber-bullying.⁵⁴



Ultimately, because school district policies are determined at the local level, there can be wide variations on the degree to which a school district is proactive and protective of LGBTQ students, families, and employees. It is important to be familiar with your school district's policies protecting LGBTQ individuals and to reach out to your school board with questions or concerns.

⁵² <http://www.equalityvirginia.org/checklist/inclusive-schools>

⁵³ H.B. 1871 (2013); Va. Code §§ 22.1-291.4, 22.1-279.6.

⁵⁴ Va. Code § 22.1-276.01.

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A Resource Guide for LGBTQ-Headed
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FEDERAL LAW

Federal law, specifically Title IX of the United States Education Amendments of 1972, also provides some protections and support to students facing bullying or discrimination based on their sexual orientation or gender identity. Title IX specifically prohibits discrimination against students in schools and other programs that receive federal funding, where that discrimination is based on a student's sex or gender. While Title IX does not explicitly include sexual orientation or gender identity as bases for a claim of discrimination, the law has been applied to prohibit discrimination where a student is mistreated for being sex or gender non-conforming,⁵⁵ meaning the student faces discrimination for not subscribing to the stereotypical notions of femininity or masculinity. In past policy statements, the Department of Education (DOE) included transgender students in those classes protected by Title IX, and lesbian, gay, and bisexual students have successfully filed claims of discrimination under Title IX. In a May 2016 statement, the DOE and Department of Justice (DOJ) explained that compliance with Title IX requires schools to treat transgender students consistent with their gender identity and does not allow schools to impose a medical diagnosis or treatment requirement.⁵⁶

However, in February 2017, under the Trump Administration, the DOE and DOJ rescinded this guidance.⁵⁷ Despite the DOE and DOJ's withdrawal of the guidance, the underlining law that the guidance interpreted remains. Since then, the U.S. Court of Appeals for the Seventh Circuit unanimously held that transgender students are protected from discrimination under Title IX and the Equal Protection Clause of the U.S. Constitution.⁵⁸

The DOE's Office for Civil Rights (OCR) investigates claims of discrimination on the basis of race, sex, national origin, sex, and disability in programs or activities that receive funding from the DOE (such as public elementary or secondary schools, vocational schools, colleges and universities, museums, libraries, and public after-school programming,). To open an OCR investigation, an individual must file a complaint on behalf of himself or herself, a group, or another person facing discrimination within 180 days of the last instance of discrimination. Since Title IX does not list sexual orientation or gender identity as separate bases for a claim, the complaint must indicate "sex" as a basis for the claim.

More details on drafting a complaint, as well as an electronic complaint form, are available on the OCR website, located here: <https://www2.ed.gov/about/offices/list/ocr/docs/howto.html>

⁵⁵ *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015).

⁵⁶ United States Dept. of Education Office for Civil Rights, *Dear Colleague Letter on Transgender Students* (May 2016).

⁵⁷ United States Dept. of Education Office for Civil Rights, *Dear Colleague Letter on Title IX* (Feb 2017): <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx>.

⁵⁸ *Whitaker v. Kenosha Unified School District*, No. 16-3522 (7th Cir. 2017).

HEALTHCARE

The Commonwealth of Virginia offers no protections against discrimination in healthcare and health insurance on the basis of sexual orientation or gender identity. Transition-related services are specifically excluded from the healthcare benefits for state employees.⁵⁹

FEDERAL LAW

Each year, the federal government opens enrollment for individual and family healthcare coverage under the Affordable Care Act (ACA). Historically, enrollment for the following year opened in November and closed mid-February of the following year; however, in 2017 the open enrollment period is much shorter – from November 1st to December 15th – although individuals who experience a major life change, such as moving, getting married, or having a baby, may qualify to enroll in one of the ACA's Special Enrollment Periods during another part of the year. For detailed information about plans, Special Enrollment Periods, or to find out where and how to enroll, go to www.healthcare.gov and select a state of residence.

Under the ACA, insurers and marketplace navigators – the people whose job it is to help individuals select an insurance

plan that best matches their needs – are prohibited from discriminating against consumers based on their sexual orientation or gender identity, or on the sexual orientation or gender identity of a family member.

In addition, the ACA prohibits denial of coverage for an individual or family member because of a pre-existing condition. This includes a current illness or a history of chronic illness or disease, HIV status, receiving or having received transgender-related care, or a prior pregnancy. However, it is important to note that, despite the fact that the ACA prohibits insurance providers from discriminating against individuals and families by denying them the ability to obtain healthcare coverage, the ACA does not mandate that insurance plans offer coverage that is inclusive of the many needs of LGBTQ individuals and families. For example, the ACA does not require insurers to cover transgender-related care or treatment for HIV and AIDS. However, insurers are prohibited from categorically denying coverage for transition-related care, nor can they refuse to cover transition-related care if they cover that same treatment for other people. While insurers are not required to cover these treatments, they may offer plans that do so; any person seeking coverage of transition-related care should speak with a navigator and investigate plans thoroughly to find the best option. Further, definitions of “family” may be too narrow to include many dependents in an LGBTQ family structure, given the myriad LGBTQ family structures that exist.

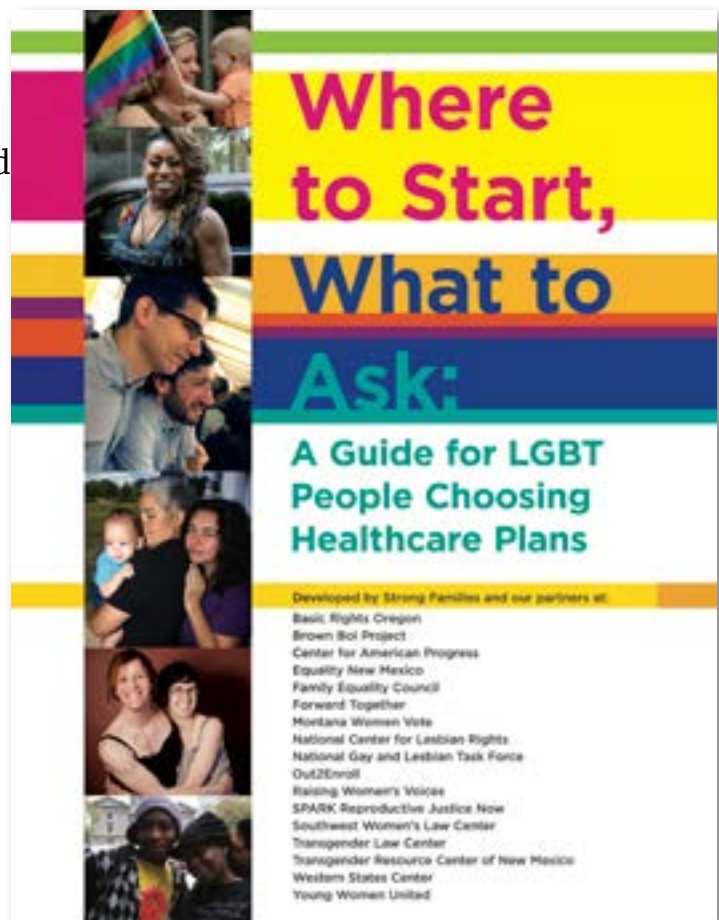
⁵⁹ Commonwealth of Virginia, Department of Human Resources, Member Handbook (July 2016), <http://www.dhrm.virginia.gov/docs/default-source/benefitsdocuments/ohb/handbooks/covacarememberhandbook2016.pdf?sfvrsn=2>.

Section 1557 of the ACA prohibits discrimination based on sex in all health programs and activities receiving federal financial assistance.⁶⁰ The final agency rule implementing Section 1557 prohibits discrimination based upon gender identity, requiring that any healthcare provider receiving federal funding (i.e. Medicaid or Medicare, any health program administered by the federal government, and any health insurance marketplace) must treat individuals consistent with their gender identity.⁶¹ The final rule also prohibits discrimination based on sex stereotyping, providing potential protections to lesbian, gay, and bisexual people.⁶²

Anyone who has experienced discrimination on the basis of their sexual orientation or gender identity in a health care setting should immediately file a complaint with the United States Department of Health and Human Services Office for Civil Rights. More details on drafting a complaint, as well as an electronic complaint form, are available at the HHS website, located at <http://www.hhs.gov/civil-rights/filing-a-complaint/index.html>.

For more information on how the Affordable Care Act and the insurance marketplaces benefit LGBTQ-headed families, this is a helpful resource developed by multiple LGBTQ advocacy

organizations: [Where to Start, What to Ask: A Guide for LGBTQ People Choosing Health Care Plans](http://strongfamiliesmovement.org/lgbt-health-care-guide).



<http://strongfamiliesmovement.org/lgbt-health-care-guide>



60 42 U.S.C § 18116.

61 45 CFR 92 (2016); 81 FR 31375 (2016). In *Franciscan Alliance v. Burwell*, Case No. 7:16-cv-00108-O (N.D. Texas 2016), a district court judge issued an injunction against enforcing this rule, but an appeal is pending.

62 45 CFR 92 (2016); 81 FR 31375 (2016).

FAMILY AND/OR PARENTING LEAVE

Virginia does not have a state family or medical leave law requiring employers to provide paid family leave. Virginia employees are entitled to the rights of the federal Family Medical and Leave Act (FMLA). The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. Eligible employees are entitled to up to 12 unpaid workweeks of leave in a 12-month period for:

- the birth of a child and to care for the newborn child within one year of birth;
- the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
- the care of the employee's spouse, child, or parent who has a serious health condition;
- a serious health condition that makes the employee unable to perform the essential functions of his or her job;
- any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty."

FMLA applies to all public agencies (state, local, and federal) and all local education agencies (schools). The FMLA also applies to private sector employees who employ 50 or more employees for more than 20 workweeks in the current or preceding calendar year.

And, it entitles eligible employees to 26 workweeks of leave during a single

12-month period to care for a covered service member with a serious injury or illness if the eligible employee is the service member's spouse, son, daughter, parent, or next of kin (military caregiver leave).

In 2010, the Department of Labor issued a clarification of the definition of "son or daughter" to include a child for whom a person provides a certain amount of day-to-day care or financial support, regardless of whether or not there is a legal or biological relationship. This clarification ensures the ability of a same-sex parent and/or partner has the ability to take time off from work to care for their child without fear of losing their job. The text of the Department of Labor's clarification is available at: http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm.

In 2014, following the *Windsor* decision and the repeal of the DOMA, the FMLA's benefits were extended to married same-sex couples. Because of this, married same-sex couples became entitled to take time off to care for their spouses. This was solidified further in 2015 when the definition of "spouse" in the FMLA was expanded to include all employees in a same-sex marriage regardless of whether their state of residence recognized their marriage. Finally, the *Obergefell* decision led to all federal marriage benefits being extended to all same-sex couples across the country.

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CHANGES OF NAME AND GENDER

A transgender individual may change their name and gender marker by obtaining a court-ordered name and gender change. To do so, an applicant must submit a notarized Application for Change of Name along with a notarized Petition for Change of Sex which Petition should include a letter from a licensed medical provider stating that sex has been changed by medical procedure. The law in Virginia does not specify what constitutes a "medical procedure," so the applicant and medical provider should make that determination.⁶³ The applicant must file the documents at the local County or City Circuit Courthouse, which are listed here: <http://www.courts.state.va.us/courts/circuit.html>. Virginia law does not require notice or publication of a petition for name change, as some states do.⁶⁴ However, some courts may require applicants to serve their Petition for Change of Sex on the State Registrar of Vital Records, and may require a hearing after the State Registrar of Vital Records has filed its Answer to the Petition stating whether or not they have any objections. Applicants can contact their local court to find out the specific requirements before filing their documentation.

Transgender individuals may request an amended birth certificate to reflect their true sex and name but must submit certified copies of the court-ordered name change and the court-ordered gender change.⁶⁵

Virginia will update names and gender markers on driver's licenses when provided with a court order certifying the name change and/or a form signed by a licensed provider certifying the applicant's gender identity.⁶⁶

Forms to petition the court for a name or gender change can be downloaded here:

Name change: <http://www.courts.state.va.us/forms/circuit/cc1411.pdf>

Gender marker change: <http://www.courts.state.va.us/forms/circuit/cc1451.pdf>

Note: Some jurisdictions have local versions of these forms that they require applicants to use. Applicants should check the website for their local civil circuit court, or call the clerk of court for specific instructions. Unfortunately, the process often still requires consulting with or hiring an attorney to assist.

⁶³ National Center for Transgender Equality, ID Documents Center - Virginia, last updated June 5, 2017, <http://www.transequality.org/documents/state/virginia>.

⁶⁴ Va. Code § 8.01-217.

⁶⁵ Va. Code § 32.1-269.

⁶⁶ National Center for Transgender Equality, ID Documents Center - Virginia, last updated June 5, 2017, <http://www.transequality.org/documents/state/virginia>.

HATE CRIMES PROTECTIONS

Virginia law does not include protections for LGBTQ people who are targeted by hate crimes. In Virginia, the law increases penalties for criminal acts against persons or property with the intent of instilling fear or intimidation against the victim on the basis of race, religion, and national origin.⁶⁷ In some circumstances, however, threats, harassment, or discriminatory language may be actionable in civil court under Virginia's insulting words statute, which provides that "All words shall be actionable which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace."⁶⁸

The federal government offers some protection, however. In 2009, Congress enacted the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which expands federal hate crimes to LGBTQ people.⁶⁹ The law allows federal law enforcement agencies, such as the FBI, to investigate and prosecute hate crimes against LGBTQ individuals when local or state authorities fail to act. Victims of a hate crime should report the crime both to the local authorities and to the FBI. The FBI maintains three field offices in Virginia, which may be found through the following webpage: <https://www.fbi.gov/contact-us/field-offices>.



⁶⁷ Va. Code §§ 18.2-57, 18.2-121, 52-8.5.

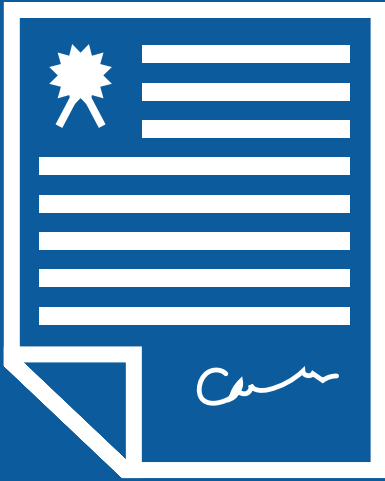
⁶⁸ Va. Code §8.01-45.

⁶⁹ 18 U.S.C. § 249.

Find more information at:

www.familyequality.org
www.equalityvirginia.org

VIRGINIA LGBTQ FAMILY LAW
A Resource Guide for LGBTQ-Headed
Families



TIPS FOR LEGAL DOCUMENTS

- ✓ Always have copies of these forms with you, we recommend carrying electronic copies on a thumb drive attached to your keychain.
- ✓ Keep several signed original copies of the forms.
- ✓ Write with a blue pen when completing or signing forms so health care providers don't question whether the document is an original.
- ✓ Always have original copies with you when you travel out of state.
- ✓ Keep an extra copy of your forms somewhere easy for a close friend or family member to find.
- ✓ Keep copies online on a secure server.

RECOMMENDED LEGAL DOCUMENTS FOR SAME-SEX COUPLES

LAST WILL AND TESTAMENT

A Will is a legal document by which a person directs how real estate and personal property will be distributed upon death. Unmarried same-sex couples must have Wills in which their partners are designated beneficiaries, so that the partner will be able to inherit any of the deceased partner's property. Even if married, it is best to have a Will. In addition to deciding property distribution, a Will also provides the opportunity to designate who should become guardian to any minor children as well as who should be a trustee to oversee any funds meant to support the minor children. If both parents are not legally recognized as such, and the legal parent dies, a judge will decide who the guardian will be. A legally recognized parent naming the other parent in a Will expresses their wishes and increases the likelihood that a judge will respect those wishes about who should raise the children after the death of the legally recognized parent.

A Will does not affect beneficiaries that have been designated on bank accounts, insurance policies, or retirement accounts. The company that holds those funds will disburse them to the designated beneficiary. It is important to keep such designations up-to-date.

More information is available from the Virginia State Bar Association at:
<http://www.vsb.org/site/publications/wills-in-virginia>

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A Resource Guide for LGBTQ-Headed
Families

ADVANCE DIRECTIVE FOR HEALTHCARE

An Advance Directive for Healthcare allows Virginians to direct whom they want to make medical decisions for them, as well as providing for end-of-life choices in the event they are unable to express that intent at the time that care is required. More information on Advance Directives in Virginia is available at: <https://www.vda.virginia.gov/advmedir.asp>.

GENERAL POWER OF ATTORNEY

It is important that partners consider providing each other with the power to handle personal finances and other affairs on their behalf through a “general power of attorney” in the event that a partner becomes unable to manage his/her own finances and other affairs due to sickness or incapacitation. We recommend consulting a Virginia attorney in drafting this document.

DOMESTIC PARTNERSHIP AGREEMENT

A Domestic Partnership Agreement expresses a couple's understanding as to how they will share income, expenses, assets and liabilities. It also discusses a plan for division of those things in the event the couple separates. This document is especially important for couples who are not married.

CO-PARENTING AGREEMENT

A Co-Parenting agreement is a document that expresses a couple's understanding of the manner in which they will raise children and what each parent's rights and obligations are with respect to each child while they are together and in the event that the parents separate.

Although the Co-Parenting and Partnership agreements are not "standard" and will require the advice of an LGBTQ aware attorney licensed in Virginia (and could still prove to be not legally binding), they are often useful to have. These documents can establish clear understanding between the parties and can provide clarification about the intent and wishes of all involved. They may be useful, at some future time, should an issue ever come before a court in the case of death, dissolution of the relationship, or other event causing separation.

Find more information at:

www.familyequality.org
www.equalityvirginia.org

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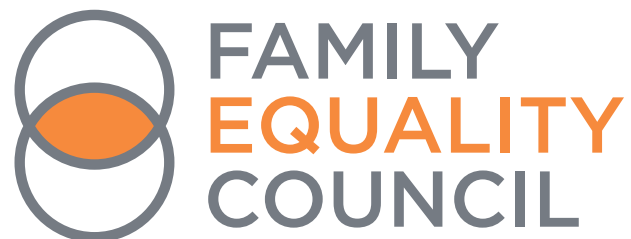
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Lesbian couple wins right to have names on children's birth certificates

By LAURA KEBEDE Richmond Times-Dispatch | Posted: Sunday, January 25, 2015 10:30 pm



Joani Hayman (foreground) and Maria Hayman sit with their twins, Finn (front) and Merida. Joani contributed eggs that were placed in Maria after being fertilized with a donor's sperm.

When Maria Hayman delivered her twins, Merida and Finn, on June 13, 2013, at St. Francis Medical Center, there was no doubt in her mind as to who the other parent was.

Her wife, Joani Hayman, had contributed eggs that were placed in Maria after being fertilized with sperm from a donor who had revoked his parental rights.

But Joani's name was not allowed on the children's birth certificates because [egg donors do not have parental rights](#), according to the Code of Virginia.

But after an 18-month game of wait-and-see as the issue of gay marriage was being settled in Virginia, Richmond Judge Designate T.J. Markow last month ordered the Office of Vital Records in the Virginia Department of Health to amend the birth certificates to show Maria and Joani as the "only parents of the children."

The Haymans initially contemplated pursuing a custody order, or what their attorney, Colleen Quinn, says was called “LGBT two-parent protocol” in Virginia by lawyers familiar with same-sex couple cases.

Because of the unique nature of the twins’ birth, Quinn saw an opportunity to make a legal case for Joani’s inclusion on the birth certificates and offered to take on their case pro bono.

“I couldn’t bill them for something I wasn’t sure would be successful or not,” said Quinn, who has advocated for “family security and preservation” for same-sex couples.

“All I could get for my same-sex couples (prior to marriage equality) was a joint custody order. ...They get like 85 percent of what a parent would be as a guardian.”

The Haymans started their legal fight a few months after the twins were born not just to make a statement, they said. Legal recognition of their already-formed family was important to them.

“This is best for our family, so we’re going to try. I thought it would be longer,” Maria said. “Even if you’re with your partner and your children and you’re a family, it matters. But it’s on paper when the world recognizes you as a family.”

The case utilized five main arguments, one of which was a related legal precedent set in Virginia.

That 2005 case involved three same-sex couples who adopted children born in Virginia but had out-of-state adoption orders listing both as parents. The Supreme Court of Virginia rejected the argument that “adoptive parents” had to list mother and father on the birth certificate because no law defined adoptive parents as a man and woman.

Quinn also argued that, [under the paternity statutes of the Virginia Code](#), if a man could use DNA testing to establish himself as a parent and be placed on a birth certificate, then so should a woman. The same standard should be applied to prove maternity, in which Joani would be recognized as their mother because she contributed the eggs.

“If a man can contribute his sperm and not carry the child and be deemed a legal parent, then a woman can contribute her eggs and be deemed a legal parent,” Quinn said.

She cited numerous cases where the right to “in loco parentis,” Latin for “in place of a parent,” status outside the definitive nuclear family can be constitutionally protected for people with emotional attachments to the children and who have daily child-rearing responsibilities without expectation of payment.

The remaining two arguments dealt with Joani and Maria's marriage, noting Virginia's recent recognition of gay marriage and the court's responsibility to acknowledge the Haymans' marriage in Washington, D.C.

Quinn finished the brief near the end of 2013 when Virginia's reckoning with gay marriage was in full swing, but wanted to wait in case she could add the argument about Virginia's stance on the issue. The arguments were strong before the U.S. Supreme Court paved the way in October, Quinn said, but the ruling — or lack thereof — "clenched the deal."

"When marriage equality went through, I knew it was the right time to file the brief," Quinn said.

Joani and Maria met on an online dating site in 2009 and quickly became friends.

Maria was in the D.C. area, Joani in Richmond. The two moved in together in Joani's Forest Hill home in 2009 and got married in D.C. in March 2012.

"It was just an easy natural pairing," said Joani, 38.

Having kids was a deal-breaker for Maria, and they talked about it early in their relationship, she said.

"I knew I wanted to get married and have kids," said Maria, 29.

It was just a matter of who would carry them.

"I don't think pregnancy would be your thing," Maria said, smiling at Joani and patting her hand as the two shared the family couch with Merida and Finn, recalling their early conversations about raising a family.

Joani's father died before she had any children, so it was important to her to have her "own genetic children."

"I wanted to have a piece of my dad in my kids," she said.

Merida, now 19 months old, has wavy hair like Joani's. The hair in the photo they had of the sperm donor resembled Joani's father's dark, straight hair, which played into their decision to choose the donor. They don't know his name, but they share a Facebook group with the parents of the twins' half brother in Texas and the parents of the twins' half sister in Minnesota. One of the sets of parents is another lesbian couple.

"The boys both have giant hands," Joani said of Finn and his half brother.

The couple's issues with Joani's legal exclusion as a parent ranged from inconvenience to anxiety over their children's safety.

Before Joani was legally recognized as a mother of the children, she couldn't sign them in at the doctor's office, and if they were in an emergency room without Maria, she couldn't make any medical decisions.

A few months into her pregnancy, Maria made the decision to quit her high-stress job and pay significantly higher premiums for extended health insurance. She was not allowed onto Joani's insurance plan because their marriage was not recognized in Virginia.

Maria now stays home with the twins in their three-bedroom house. The couple have considered having a third child, this time with Maria's eggs and womb.

Joseph Gianfortoni, as director of LifeSource Fertility Center, has seen many people who want to create a family outside the typical nuclear family model in his more than 30 years in assisted reproductive technology.

He cited single straight men who contribute sperm to raise a child and gay and lesbian couples who were his clients who have children in their 20s and 30s now.

"They just want to have a family, have a child," he said. "They want to bind the relationship together better. ... They always felt they were a couple anyway, they just weren't able to do it legally."

The typical in vitro fertilization similar to the Haymans' can cost \$15,000 to \$20,000, he said, and can be riskier for older women contributing eggs. That's why two eggs are used to increase the likelihood of a successful pregnancy, but also increases the chance of twins.

During her pregnancy, Maria was approached by her then-supervisor who said several people in the office were "uncomfortable with your procedure."

"You mean my pregnancy?" Maria recalls replying. "I was just blown away by that statement."

Play dates are often stressful for Maria, especially with other stay-at-home mothers who don't know about their marriage or their family structure.

One instance in particular stands out for Maria. A mother she had connected with and had multiple play dates with stopped talking to Maria when she found out Joani was her wife.

“It’s still awkward when you meet new people and moms at the park,” she said. “There’s always a little bit of anxiety that someone will mess with us, because to us it’s normal.”

Joani said that even though Virginia’s laws have changed, she looks forward to the day when “the biggest barrier is crossed” of commonplace discrimination outside the courtroom.

“We’re not scary. We’re actually normal people,” she said.

Kids' birth certificates must list both moms

By: Deborah Elkins December 22, 2014



Two mothers – one genetic and one gestational – have won a court order to list both women as parents on their twins' birth certificates.

The two women married in Washington, D.C. in 2012 and currently live in the Richmond area. Joani Hayman is the genetic mother of the couple's twin son and daughter. As the genetic mother, her eggs were inseminated with sperm from an anonymous donor, and the embryos were implanted in Maria Hayman, who carried the pregnancy.

Flannan Finn Hayman and Merida Mirin Hayman were born in St. Francis Medical Center on June 13, 2013. The Haymans petitioned a Richmond Circuit Court to "conclusively establish by clear and convincing evidence" that they both are the "biological parents of the children."

On Dec. 8, Richmond Judge Designate T.J. Markow signed the order without a hearing, according to the couple's attorney, Richmond lawyer Colleen M. Quinn. The order directs the Virginia Department of Health's Office of Vital Records to amend the birth certificates to show the two women as "the only parents of the children."

In their petition, the couple relied on Va. Code §§ 20-49.1(A) and 20-49.4, which govern establishment of a parent-child relationship and identify evidence that can prove parentage.

The Haymans' petition also included an affidavit and chronology from the physician who performed the assisted reproduction procedures, and cited the sperm donor's agreement to relinquish biological and legal parental rights to the children.

The mothers asked to be "declared the biological and legal parents" of their two children and "to be found to have any and all parental rights and responsibilities for" the children. As the gestational mother, Maria was the presumed legal mother of the children, and she petitioned the court to recognize Joani as their biological and joint legal mother.

Quinn's brief on behalf of the family argued that Virginia's statutory scheme governing birth certificates does not preclude two same-sex parents from being listed on a birth certificate, and determinations of maternity must be treated the same as determinations of paternity, in order to comply with constitutional equal protection.

"Identification on the child's birth certificate is the basic currency by which parents can freely exercise those protected parental right and responsibilities," Quinn argued in her brief.

The order specifically states that the two women "are the biological parents" of the children, the anonymous sperm donor has no parental rights, and the two mothers "are the only legal parents, guardians and next friends of the minor children and shall have sole custody, responsibility and parental rights with respect to the children."

The *Hayman* case is the latest variation in obtaining birth certificates for the children of same-sex parents. In 2005, the Supreme Court of Virginia said the state had to provide new birth certificates for children born in Virginia and adopted by same-sex couples in other states. The court said in *Davenport v. Little-Bowser* that nothing in Virginia's statutory scheme for issuing birth certificates precluded recognition of same-sex couples as "adoptive parents."

Quinn has worked with other Richmond-area same-sex couples to clear up birth records.

Earlier this year, a Chesterfield Circuit Court entered an order giving full faith and credit to a California pre-birth order listing two mothers on the birth certificate of a child conceived through assisted reproduction using an egg from one parent and sperm from a known donor. The couple had to seek a court order because only the birth mother was listed on the first Virginia birth certificate, Quinn said.

In a case decided in June in Richmond Circuit Court, the court honored a Maryland pre-birth order in which a surrogate mother agreed to carry an implanted embryo for two fathers who wanted to be listed on the birth certificate. Initially, neither the local hospital nor the vital records office would recognize the court order. However, the office of then-Attorney General Ken Cuccinelli, an opponent of same-sex marriage, later approved issuance of the birth certificate listing the two fathers.