The Law Governing LGBT-Parent Families

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Many LGBT people, alone or in couples, want to add children to their families. There are a variety of ways this can be done, and individuals or couples may explore several paths before settling on a plan (Goldberg, 2010). One initial choice is often whether to pursue adoption or some form of assisted reproduction. Either of these choices will lead to more choices. For example, if one chooses adoption, does one pursue domestic or foreign adoption? Can a couple adopt a child together? Choosing assisted reproduction leads to other questions, and generally different ones for women (who typically have access to ova and need sperm) and men (who generally have access to sperm but need both ova and a woman to gestate the child). LGBT couples becoming parents will face yet more questions: For example, whatever the method by which one person attains legal parentage, will the other person's parental rights also be secure? If not, can steps be taken to secure them?

As complicated and layered as these choices are, it is essential to understand that each choice brings with it its own set of legal considerations. Failure to consider the legal ramifications of the various courses of action being considered can result in future difficulties for the individuals and families involved. Understanding the basic outlines of the law of parentage as it pertains to LGBT people can assist individuals in understanding their options and in assessing their legal positions and also help them understand why attention to legal status issues is so critical.

Because there is so much variation in the law as well as near constant change in law, it is practically impossible to accurately summarize the current state of the law at any given moment. Even if it were possible to do so at any given moment, the summary would quickly become unreliable and outdated, as the law in this area changes rapidly just as social attitudes are changing. The goal of this chapter is therefore not to provide a specific account of the law as it stands today. Instead, this chapter provides a brief introduction to the major legal principles that shape the law. For more specific and concrete analysis of individual situations, one would be well advised to consult a lawyer familiar with the relevant law in the relevant jurisdiction.[1]

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[1]National legal organizations that focus on lesbian, gay, and transgender rights may be helpful in locating a knowledgeable local attorney. The websites of both the Lambda Legal Defense and Education Fund (http://www.lambdalegal.org/) and The National Center for Lesbian Rights (http://www.nclrights.org/) offer legal help desks. A recent publication provides guidance for queer couples who are engaged in co-parenting disputes. *Protecting Families: Standards for LGBT Families* is jointly produced by GLAD (Gay and Lesbian Advocates and Defenders) and NCLR. The standards can be reviewed at http://www.glad.org/protecting-families.

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From a legal perspective, the process by which LGBT adults become parents (adoption or assisted reproduction) is critical. During this process one or both adults (if there are two adults) may gain recognition as a legal parent. Different legal outcomes will result as a function of both on the process used and the law of the relevant states.

Once recognition as a legal parent is attained, subsequent legal issues become significantly less complicated. The rights of legal parents are well understood and do not vary based on the sexual identity of the parents. For instance, resolution of a custody dispute for an LGBT couple where both parties are legal parents is legally indistinguishable from a heterosexual child custody case: The individual facts of the case will be critical, but the two adults stand on equal legal footing. The deciding factor will be the best interests of the particular child or children involved. By contrast, if one member of the couple is not a legal parent, she or he will be at a nearly insurmountable legal disadvantage. This chapter uses the initial question of recognition as a legal parent as the organizing structure for a larger discussion of the legal issues facing LGBT parents and prospective parents.

Overview: The General Structure of Family Law in the United States

Nearly all family law in the USA is state (as opposed to federal) law. This means that as a general rule, family law is made by state legislatures or state courts rather than by the United States Congress or federal courts. While it is easy to point to broad commonalities (e.g., every jurisdiction has marriage, all have recognized parent/child relationships, all legally recognized parents have strong rights and obligations vis-à-vis their children) the specifics of the law (e.g., who can get married, when is a person recognized as a parent) vary significantly state to state. Each of the 50 states as well as the District of Columbia and the US territories has its own body of law (Crockin & Jones, 2010).

For married heterosexual-parent families, the most important aspects of family law (marriage and the recognition of parent/child relationships) are well established and reasonably uniform. While there are some state-to-state differences in the finer points of marriage eligibility (minimum age for marriage varies, for instance), unrelated adult heterosexuals who are not already married are generally eligible to marry in all states. Additionally, states readily accord respect to marriages performed in other states, so if a heterosexual couple marries in New York, they can travel freely around the USA, knowing that all other states will recognize their marriage. Thus, the state-law nature of family law is rarely a source of difficulty or even comment for these couples. If a heterosexual couple marries and has children in one state, they will automatically be recognized as married parents in every other state.

By contrast, the laws that protect or affect LGBT-parent families vary widely state to state. These variations have been the subject of substantial political turmoil in the last decades. There is much less uniformity concerning the terms for recognition of either adult relationships or parent/child relationships, and the general approaches of the states vary widely (Herek, 2006). Some states allow same-sex couples to marry while some do not permit marriage but recognize domestic partnerships or civil unions and still others do not grant legal recognition to same-sex relationships at all. In some states the rights conferred by a civil union or a domestic partnership approximate the state-law rights of marriage. In other states, civil unions and domestic partnerships may confer a lesser set of rights. LGBT people must familiarize themselves with the laws of the state where they live to properly assess their family status. Understanding the relevant law is the first task for lesbian and gay family members.

Yet even when one has properly assessed one's family status under home-state law, the state-law based structure of American family law generates further complexity for LGBT-parent families. Whatever the legal status of a family in its home state, there is no guarantee that other states will recognize and respect that legal status. The marriage of a same-sex couple that is proper in New

York or Massachusetts will not be recognized as a marriage in New Jersey (which does not currently permit same-sex couples to marry), though it may be treated as though it was a civil union. Perhaps more importantly, the relationship will not be recognized *at all* in Virginia or Ohio (O.R.C. § 3101.01, 2004; VA Code Ann. § 20–45.3, 2004). None of the rights and obligations of marriage would be afforded to the couple in these states. Thus, if one member of the couple were hospitalized while traveling in Virginia, the other might be denied the right to visit or to make medical decisions—rights that would routinely be extended to a different-sex spouse.

Recognition of legal parentage may be subject to similar interstate variation. For example, suppose P (parent) and C (child) live in state A and that the law in state A recognizes a legal parent–child relationship between P and C. Now suppose that there is a neighboring state, B, where the law is different so that as a general matter, state B would not recognize a person in P's position as a parent of C. If P and C move from state A to state B, is P still a legal parent? Does P's legal status as a parent evaporate when the state line is crossed? This question of parental status is not an academic one. Parental status is of immense practical importance. Will state B allow P to authorize medical care for C, as a parent is undoubtedly able to do? Can P visit C in a hospital? Can P enroll C in school? If P died, would C inherit as a child of P? These questions cannot always be answered generally. LGBT parents confront a world rife with legal uncertainty.

As was noted above, there is little direct federal family law. Instead, generally speaking, the federal government will recognize family relationships that are properly established under the relevant state's law. Thus, if the parent–child relationship between P and C is recognized by state A it will generally be recognized by the federal government (Crockin & Jones, 2010). This recognition provides the child with access to federal programs based on the parent/child relationship, such as social security survivor benefits or veteran's benefits.

The notable exception to the rule that family law is generally state law is the federal Defense of Marriage Act (DOMA). DOMA has two main provisions. One purports to regulate the interstate recognition of marriage, explicitly allowing states to deny recognition to out-of-state marriages between same-sex couples (28 U.S.C. § 1738C, 1996). The second provision, more important to the discussion here, prohibits the federal government from recognizing lawful state marriages between people of the same sex (1 U.S.C.A. § 7). This means that while a same-sex couple can be lawfully married in Massachusetts, the federal government is prohibited from recognizing the couple as married. The practical effect of this is important. Federal benefits ordinarily available to a couple—Social Security benefits or exclusion from federal estate tax, for example—are not available if the married couple is a same-sex couple. The validity of this provision of DOMA is also being litigated in several lawsuits (see, e.g., Gill v. Office of Personnel Management, 2010). The Obama Administration has concluded that DOMA is unconstitutional and is no longer defending the statute. Nonetheless it may take several years before the validity of the provision is resolved (Cooper, 2011).

The next section of this chapter examines general family law principles that apply in all states. It will also consider constitutional law—which is to say those family law principles found to be rooted in the United States Constitution. Because the Constitution is binding in all states, principles of constitutional law necessarily apply to all states. It is only because the principles introduced here are stated relatively abstractly that generalizations can be offered. The specifics of family law vary significantly state to state. Thus, the outcomes of particular cases may vary by state.

The Importance of Legal Parenthood

"Parent" is a word with many meanings. In common speech it is often coupled with different modifiers. Thus, there can be stepparents and social parents, natural parents and adoptive parents, and so on. The critical category for law is, unsurprisingly, that of *legal parent*. A legal parent is a person who the law recognizes as a parent

of the child in question. People who function as social parents may or may not be legal parents, just as legal parents may or may not be social parents.

It is difficult to overstate the importance of being a legal parent. Legal parents are assigned a wide array of both rights and obligations with regard to a child. As long as the actions of a legal parent do not directly endanger the child, neither the state nor other individuals (who are not themselves parents) can interfere with them. Legal parents have great latitude within their families and can invoke powerful protections to prevent outside interference (Polikoff, 2009).

Throughout the USA, as in many countries throughout the world, the legal rights of those recognized as parents are far superior to the legal rights of those who are not legal parents. Legal parents have the right to make important decisions for their children as to education, upbringing, religion, and health care. Legal parents can decide who their children see and spend time with and can exclude nonparents from their children's lives. At the same time, legal parents have obligations to care for, protect, and support their children and can be subject to prosecution where they fail to fulfill their obligations (Polikoff, 2009).

The Supreme Court has recognized that the rights of a legal parent are constitutionally protected (Troxel v. Granville, 2000). In Troxel, a trial court ordered visitation between two children and their paternal grandparents over the objections of the children's mother. (The children's father was deceased.) The trial judge did so because he found that visiting the grandparents would be beneficial to the children. The United States Supreme Court concluded that the trial court's action violated the constitutionally protected parental rights of the mother. (The mother's status as a legal parent was never in doubt.) The Supreme Court did so even though it might well have been beneficial to the children to visit the grandparents. The choice of who the children were to see properly lay with their mother, and the state (here acting through the trial judge) could not constitutionally interfere with her choice absent some specific circumstances. While those precise circumstances might remain ill defined, the general import of Troxel is clear: All states are required to recognize and enforce strong parental rights. Absent special circumstances, a legal parent's decisions will stand.

The circumstances under which a legal parent's judgment will be overridden are narrow but have historically been of some concern to LGBT-parent families. A legal parent loses the protections described above where the parent is found to be unfit. In the past, there have been cases where unfitness has been premised on a parent's identification as lesbian or gay. In some instances, proof that a parent was a lesbian or a gay man constituted proof that the parent was per se unfit (N.K.M. v. L.E.M., 1980). These cases arose where a heterosexual relationship that had produced children dissolved and one of the parties subsequently identified himself or herself as gay or lesbian. The heterosexual parent would invoke the sexuality of the parent newly identified as LGBT as a basis for disqualifying that parent from receiving custody (Joslin & Minter, 2011).

In more recent years, this approach has been rejected in favor of a nexus test focused on the relationship between parental conduct and harm to the child (Shapiro, 1996). Use of the nexus test is now nearly universal. Only actual conduct which is shown to cause harm to the child may be a basis for a finding of unfitness (Joslin & Minter, 2011). This test requires an individualized analysis based on the specific facts of each case. In the hands of a fair judge, it places lesbian and gay parents on an equal footing with all other parents with regard to unfitness inquiries. Findings of parental unfitness are relatively rare and the overwhelming majority of lesbian and gay people who have obtained legal recognition as parents will be fit parents.

To summarize, the only person who can directly challenge a fit legal parent's decisions in court is another fit legal parent. Where two fit legal parents disagree over the custody/control of a child or children, a court will determine the outcome in a conventional custody case. In such a case, the best interests of the child become the court's guiding principle. But if a fit legal parent has a disagreement with a person who is *not* a legal parent, the fit legal parent has an immense

and typically insurmountable advantage. It is the fit legal parent's right to determine the outcome, and courts will be loath to interfere. Where they do interfere, they will grant the fit legal parent's decision great, typically dispositive, deference.

In contrast to the earlier era where many cases arose upon dissolution of heterosexual relationships and subsequent identification as lesbian or gay, modern LGBT family law is distinguished by a series of cases where two people—most often lesbians but increasingly gay men as well—raising a child together separate and disagree over the continuing care and custody of the child. A review of the active cases on the websites of the organizations cited above reveals that there are now more intra-lesbian cases than there are cases involving a lesbian parent and a heterosexual parent. Of course these cases may come to court as ordinary custody cases where two legal parents compete, but in the most troubling cases, the dynamic is quite different. One woman argues that she alone is a legal parent. She asserts that her former partner, who may have functioned as a parent for any number of years, is not a legal parent. If this argument succeeds, the end is virtually certain—the nonlegal parent's relationship with the child (and the child's relationship with her) has no protection (Alison D. v Virginia M., 1991). The legal mother alone is entitled to decide with whom the child spends time. If she prefers that the child not see her former partner, the child will not see her. These cases graphically illustrate the power of the legal parent and the necessity of attention to legal status in family formation. These problematic outcomes are best avoided if LGBT people forming families take steps to ensure recognition of legal parentage in both parties.[2] The following section examines the law governing the methods by which LGBT people bring children into their relationships.

Bringing Children into a Family

Broadly speaking there are two alternative paths to legal parenthood: One can become a parent to an already existing child via adoption or one can participate in the creation of a new child via the process of conception/birth. Each path has its own complications and potentials, particularly for LGBT prospective parents. In the first two of the following sections, these options will be examined in more detail. Because the original formation of a family sometimes only involves recognition of one legal parent, legal devices for securing rights for additional legal parents will then be considered.

Adoption

Generally speaking adoption is a process by which a child acquires a new parent or set of parents who take the place of an earlier parent or set of parents.[3] While adoptions can be (and often are) arranged in advance of the birth of a child, there is always some period of time after the birth of the child during which the birth parent(s) can revoke their consent to the adoption. This period varies from place to place and may be quite short, but it is important to recognize that it exists.

There is no general right to adopt. Thus, prospective parents must apply to the state for approval to adopt. The process for assessing prospective parents is typically delegated to either a state or private agency, but the legal process for the adoption and the requirements for adoptive parents are essentially similar in the public and private systems in any given state. The approval process may be quite time-consuming, intensive,

[2]Litigation of these cases can be destructive for the lesbian and gay communities as well as for the individuals involved. This is the motivation for the recent pamphlet "Protecting Families"—a coproduction of GLAD and NCLR. http://www.glad.org/uploads/docs/publications/protecting-families-standards-for-lgbt-families.pdf.

[3]The important exception to this generalization is second-parent or stepparent adoption, which is discussed below. Absent adoption, a stepparent is typically not a legal parent. To the extent the stepparent has any legal parental rights, they depend on the legal relationship with a preexisting legal parent and terminate if the relationship with the legal parent terminates.

and expensive. It usually includes a home study as well as criminal background checks. Home studies are generally an evaluation of the fitness of the prospective parent(s) to raise a child or children and may or may not include an actual visit to the home. Prospective LGBT parents may face a variety of special concerns, particularly with respect to laws restricting access to adoption. Restrictive access to adoption is discussed further below.

Once an adoption is properly completed, adoptive parents are full legal parents. Thus, they have the full range of parental rights regarding custody and control of their children as well as the full set of parental obligations. A dispute over custody of a child between two adoptive parents or between an adoptive parent and a natural legal parent should be handled as any dispute between two recognized legal parents of the child would be. In most instances this means that a court will attempt to determine the best interests of the child and that the two parents stand on an equal footing at the beginning of this inquiry.

Adoption is generally said to be irrevocable, though parental rights can be terminated due to unfitness. It is extremely difficult to challenge a completed adoption.[4] It is important, however, for prospective parents to be forthright and honest during the evaluative process involved in adoption. Fraud (which is deliberately misstating facts) and/or concealment of significant facts about past conduct or about one's qualifications as an adoptive parent may undermine the validity of an adoption. While candid disclosure of some matters (a criminal record or a history of mental illness, for instance) may make the path to adoption more difficult, it ensures that once completed the adoption will stand. Careful attention to disclosure requirements may be especially important to prospective LGBT parents who find themselves in a hostile legal environment as allegations of fraud could provide a basis for a hostile court to invalidate an adoption. Consultation with experienced legal counsel is strongly advised.

As noted above, state restrictions on who may adopt vary. Some of the restrictions are of particular importance to prospective LGBT parents. Perhaps most notably, until 2010 Florida barred lesbian and gay people from adopting. This explicit restriction was unique to Florida and was enacted as a result of the Anita Bryant campaign of the late 1970s. At the same time, Florida did not bar lesbian and gay people from acting as foster parents. Martin Gill was a committed foster parent for two boys over the course of several years. In time he sought to adopt the boys to establish a permanent relationship with them. Strong testimony was offered to demonstrate that it was in the interests of these children to be adopted by Gill and also that lesbian and gay people make suitable parents. As a result the Florida appellate court struck down the ban on lesbian and gay adoption (Florida Department of Children and Families v. In re Matter of Adoption of X.X.G. and N.R.G, 2010). No further appeal was taken (Joslin & Minter, 2011). Thus, at this time, no state explicitly bars lesbian and gay people from adopting because they identify as lesbian or gay (Joslin & Minter, 2011).

The course of the Gill case is noteworthy in part because of Gill's progression from foster parent to adoptive parent. Some states may be more accommodating of LGBT people who wish to be foster parents. It is not uncommon for foster parents to seek to adopt the children they foster where the placement has proved enduring and successful. Indeed, many would say this is a desirable outcome. Once a parent/child bond has developed between an LGBT person and a foster child, courts and agencies may be more willing to recognize the importance of an adoption to ensure stability and permanence to that relationship, as was the case in Gill.

All states permit adoption by unmarried individuals who are otherwise qualified to adopt. With the demise of the Florida ban, single LGBT

[4]A recent case from the North Carolina Supreme Court, Bozeman v. Jarrell, is a disturbing exception to this rule (Boseman v. Jarrell, 2010). In this case the NC Supreme Court voided a second-parent adoption years after it was completed. In addition, the court appears to have voided all other second-parent adoptions completed in North Carolina. While the case is an extreme outlier, it is also a sobering reminder that on rare occasions adoptions *can* be challenged long after the fact.

people are generally eligible to adopt in all states.

The prospect for same-sex couples seeking to adopt jointly is more complicated. A number of states now limit joint adoptions to married couples only. For instance, in Louisiana, an adoption can be completed by a single person or by a married couple (LA. CHILD. CODE ANN. art., 1221, 2004). However, two people who are not married to each other cannot adopt jointly. Since Louisiana does not permit or recognize marriage between two people of the same sex, lesbian and gay couples cannot adopt jointly in Louisiana.

This combination of laws is not unusual. The states that restrict joint adoptions to married couples uniformly deny access to marriage for same-sex couples. Thus, the requirement that joint adopters be married effectively excludes same-sex couples from joint adoption in those states. This is hardly coincidence. The majority of the married-couple-only restrictions were enacted after the struggle over access to marriage for same-sex couples intensified in the early 2000s. They generally followed state enactment of restrictions, either constitutional or statutory, on access to marriage and were promoted by the same coalitions of conservative political and religious actors. Efforts by these same political coalitions to directly restrict access to adoption for all lesbian and gay individuals were unsuccessful and restrictions on joint adoptions were substituted instead. Thus, in states like Louisiana the law establishes a seemingly peculiar rule that a single lesbian or gay man can adopt even though a lesbian or gay couple cannot.

In most states where joint adoption is not possible, one member of the same-sex couple would still be eligible to adopt, as nonmarital cohabitation is not a bar to adoption.[5] While this may be an important avenue to parenthood for a same-sex couple, it is at best an imperfect solution. The end result is a family where one member of the couple has status as a legal parent and the other does not. As is discussed elsewhere in this chapter, this can have very serious consequences. The nonlegal parent will be at a severe disadvantage in the event that the relationship between the adults dissolves or the legal parent dies. Further, benefits and obligations that ordinarily run between parent and child may not be recognized or imposed. Thus, it is possible that a child will not receive social security if the nonlegal parent dies or is injured. The nonlegal parent may not be able to make medical decisions for the child in the event of an emergency or to visit the child in a hospital. Further, a child may have difficulty establishing an entitlement to financial support from a nonlegal parent.

Lawyers may be able to prepare documents which will ameliorate some of the legal disadvantages experienced by the nonlegal parent and should be consulted, but these documents may not be honored in all states, and the powers granted by them may be revoked in the event the legal parent wishes to do so. Other possible avenues by which a nonlegal parent may gain legal protection are discussed below.

Couples seeking to adopt may wish to consider relocating to a more hospitable state. Most states require residence for a period of time (the precise time varies but is often around six months) before a couple can invoke that state's adoption laws.

Transgender people may face unique challenges during adoption. While no state specifically addresses the eligibility of transgender people as adoptive parents, doubtless individual agencies and judges would consider this a significant factor (Joslin & Minter, 2011). Similarly, many judges and agencies would view the failure to disclose transgender status as a meaningful omission. Thus, careful consultation with a lawyer is essential.

Many LGBT people consider international adoptions (Joslin & Minter, 2011). As is true with the states, different countries have different rules about who is permitted to adopt. Some permit single people but not unmarried couples. Many do not permit LGBT people to adopt. Issues about the extent to which full disclosure is required or advisable are not uncommon. Individualized legal advice is strongly recommended as international adoption adds additional layers of complexity to

[5]Utah is an exception to this. Nonmarital cohabitation does preclude eligibility to adopt there.

the adoption process. Lack of candor during the adoption process may be a basis on which the adoption itself can be undermined.

The Portability of Adoption

Given the confusing array of state laws governing adoption, it is valuable to note that once an adoption is properly concluded in one state, all other states must recognize the adoption. Thus, if a second-parent adoption is completed in Pennsylvania, Nebraska must recognize that adoption, even though Nebraska itself does not permit second-parent adoptions (Russell v. Bridgens, 2002).

This result is required by the Full Faith and Credit Clause of the United States Constitution. That Clause obliges the states to give full effect to a valid court judgment from another state (USCA CONST Art. IV § 1). Thus, Nebraska must recognize all out-of-state judgments of adoption and treat such adoptions just as it would its own adoptions. This means that adoptions are portable and can be effective as one travels from state to state. (It is prudent to carry some proof of adoption as one travels state to state.) The same cannot be said for marriages.[6]

Birth Certificates

When an adoption is completed it is common for a court to order that a new birth certificate be prepared for the child. The new birth certificate will list the legally recognized parents of the child, post-adoption. Thus, in the case of a second-parent adoption, the name of the second parent will be added. The original birth certificate is then typically sealed.

A certified copy of the post-adoption birth certificate can be produced by adoptive parents to demonstrate their status as legal parents. The birth certificate allows parents to register a child for school or enroll a child for health insurance. It is also required to obtain a passport.

Some states that do not permit two parents of the same sex to adopt jointly have resisted issuing new birth certificates for children after a second-parent adoption is completed in the couple's home state. For example, Louisiana declined to issue a new birth certificate to two gay men who had adopted a child born in Louisiana. The men had completed an adoption in New York State and thus were both legal parents. The men sued in federal court. Louisiana lost the early rounds of this litigation but prevailed in the most recent court decision from the United States Court of Appeal for the Fifth Circuit (Adar v. Smith, 2011). Thus, as things stand now Louisiana does not have to issue a birth certificate with the two men's names on it. This decision does not have any impact on the validity of the adoption but does create practical difficulties for the family.

Assisted Reproduction

The alternative to adoption for LGBT-parent families is some form of assisted reproduction. Assisted reproductive technology (ART) offers an array of options. The law has been slow to respond to rapidly developing technology, and legal responses vary widely state to state and country to country. It is therefore difficult to make any general statements about ART and parentage. Further, as the ART industry has developed, ART transactions often touch on multiple states if not multiple countries (Chapter 5). Since the different entities often have different laws, this further complicates the legal picture.

Given the nature of human reproduction, the needs of women are generally different from the needs of men. Single women and lesbian couples need a source of sperm while single men and gay male couples need both an egg and a woman to gestate and give birth to the child. Thus,

[6]It is widely agreed that marriages, which do not result in court judgments, need not receive Full Faith and Credit. Whether a state recognizes a marriage concluded in another state is a matter of comity. While the general practice is that states do recognize each other's marriages, marriages between people of the same gender are often treated as exceptions to this rule. A significant number of states have statutes or constitutional provisions mandating this result.

lesbians and gay men generally use different ART techniques and so encounter different legal issues. The following section considers these distinct issues.

ART for Lesbians

Lesbians have used assisted insemination (AI) to become pregnant for many years. As a general matter, when a woman gives birth to a child, she is automatically recognized as a legal parent of that child (Jacobs, 2006).[7] Whether she is a lesbian has no bearing on this question. The two main legal questions presented by assisted insemination are the potential parental rights of the man who provides the sperm and the legal status of a nonpregnant lesbian partner. These are considered in turn.

First, regarding legal issues around the rights of the sperm provider, lesbians using third-party sperm have several options. They can use sperm from a man they know, they can use sperm from a man who can be identified in the future, or they can use sperm from an anonymous provider. The decision as to the source of sperm is one that involves both legal and nonlegal factors. Thus, one may choose a known provider so that one's child can have a relationship with that person during childhood. Alternatively, one might choose a donor who can be identified when the child reaches adulthood so that the child can locate the person at that time. There is a great deal of current discussion about the potential social or psychological value of these options, but there are important legal ramifications that should be considered as well.

This is an area where the law varies significantly state to state. In some states a man who provides sperm for the insemination of a woman who is not his wife will not be recognized as a legal parent of any resulting child. In other states, his status will depend on whether there is an agreement regarding parental status in place or on whether or not the insemination was conducted by a medical professional. In still other states the man will have the status of a legal parent no matter what agreement is in place.[8] The first task should be to determine the relevant law. Establishing relevant law often requires consultation with a lawyer or a local LGBT rights organization. It is crucial that the information obtained be both current and reliable. It is not enough to rely on an agreement between the donor and the recipient.

If the law states that a provider is not a legal parent, then a lesbian may freely choose a known or an identifiable provider without concern that he will acquire parental rights. But if a provider is considered to be a legal father then use of a known provider means that the provider will be a legal parent of the child. Use of an anonymous provider ensures that no man will step forward to claim the legal rights of a parent and the rights of the unknown man can generally be terminated by proper legal proceedings. It may also be possible for a known provider to give up his legal rights post-birth, but the provider may change his mind and elect not to give up his rights. Further, some judges may refuse to allow him to give up his rights if it creates a single-parent family. Thus, using a known provider in those jurisdictions where a sperm provider is deemed to be a legal parent requires extremely careful consideration, preferably including input from a legal professional. In those states where the legal status of the provider depends on an agreement between the parties, care must be taken to ensure the agreement is properly crafted and expresses the clear understanding of all those involved. In most states, however, while agreements between the parties may be useful to clarify the intent of the parties, they will not have legal effect.

[7]There are limited exceptions in some states for women who are acting as surrogates (Johnson v. Calvert, 1993). These are not of considered here. Surrogacy is discussed below.

[8]These variations occur *only* when using assisted reproduction—which is to say, where conception occurs without intercourse. If a lesbian becomes pregnant via intercourse, the man who provides the sperm will almost assuredly be recognized as the legal father of the child. This is true even if there is an explicit agreement that he will not be a legal parent. It is critical that women considering family formation via this path recognize this consequence.

Second, regarding legal issues around status of the nonpregnant lesbian partner, the woman who gives birth automatically gains recognition as a legal parent. Generally speaking, the same is not the case for her lesbian partner. In some states a second-parent adoption may secure the rights of the partner. Over time she may also qualify as a de facto parent. Each of these possibilities is discussed below in the section on adding parents.

In states allowing access to marriage for same-sex couples and/or with robust domestic partnership or civil union statutes, the lesbian spouse/partner may gain legal recognition as a parent by virtue of her legal relationship (marriage/domestic partnership/civil union) with the woman who gives birth. This is an extension of a broadly recognized legal principle that the spouse of a married woman who gives birth is deemed to be a legal parent of the child. Thus, where a married woman gives birth in Massachusetts her spouse—male or female—is recognized as a legal parent as well.

The problem is that her legal status may only be recognized by states that recognize the relationship between the adult parties. Thus, states which do not recognize the Massachusetts marriage will not recognize her parental status and, as DOMA presently prevents the federal government from recognizing the marriage, it may not recognize parental status either (Polikoff, 2009). In other words, parental status gained in this fashion is not fully portable. Due to this serious limitation, it is generally advisable to take further steps to secure the legal rights of the woman who did not give birth. This generally means completing a second-parent adoption.

ART for Gay Men

Gay men who are considering ART generally use some form of surrogacy. In surrogacy a woman agrees to become pregnant and give birth without intending to be a parent to the child. Instead, she acts for another individual or individuals who are planning to be the parent or parents of the child. Those individuals are often called the "intended parents." The surrogate may be the source of the ovum (in which case the practice is called "traditional surrogacy") or the ovum may be obtained from a third party (Joslin & Minter, 2011). If the pregnant woman is genetically unrelated to the fetus she carries, this is called gestational surrogacy.

There are additional divisions among types of surrogates. Some women (such as close relatives or friends of the men intending to be parents) serve as surrogates without compensation. More commonly, surrogates are compensated.

As with most other aspects of family law, the law governing surrogacy varies a great deal state to state. In some states (California is one) surrogacy is relatively well accepted and the legal course of action is well understood, but in many states surrogacy is either illegal or of questionable status. Because of the complexity of the legal issues involved, surrogacy should never be pursued without consultation with a lawyer who has some expertise in the matter.

In some states (New Jersey, for example) a judge may conclude that any woman who gives birth is a legal parent, whether she is genetically related to the child or not. While this does not necessarily mean that surrogacy is barred in those states, it does mean that the surrogate has to confirm her intention to relinquish parental rights *after* the birth of the child. This gives her an opportunity to change her mind. For many intended parents, the prospect that the surrogate might reconsider creates difficult uncertainty, though in reality the instances in which a surrogate changes her mind appear to be quite rare.

In any surrogacy arrangement, an extensive written agreement is common. A written agreement is an expression of the understandings of the surrogate and the intended parents as to the expectations of all the parties. Even though the agreement may not be legally enforceable, it may be useful to draft an agreement to clarify the expectations. In general, the surrogate must retain the right to control her own medical care and the option to terminate or not terminate her pregnancy.

Adding Parents

Lesbian and gay male couples who form families may find that the initial steps of family formation leave them with only one legal parent. It might be the woman who gives birth or a man who provides the sperm in surrogacy. It may be that

only one member of the couple could complete a foreign adoption. However it occurs, the situation in which there is only one legal parent should be addressed since, as is discussed above, it creates a serious power imbalance within the couple.

The most certain way to secure rights for the second parent is through a second-parent adoption. They are not available in all locations. In the absence of a second-parent adoption, a person may qualify as a de facto parent. In addition, parties may enter into various forms of parenting agreements. These agreements in general will be revocable at the will of the legal parent and so do not provide a great deal of protection for the nonlegal parent. To supplement an agreement legal documentation may be prepared, but this may not increase the security of the nonlegal parent.

Second-Parent Adoptions

Second-parent adoptions are a critical legal tool in the formation of LGBT-parent families. They are to be distinguished from traditional adoptions. As is noted above, in adoption the general case is that a new parent or parents take the place of the original parent or parents. On many occasions, however, LGBT couples wish to add an additional parent while maintaining the status of the original parent. Second-parent adoptions make this possible. Second-parent adoptions are modeled on stepparent adoptions, which are widely available in proper cases. In the absence of an adoption, stepparents are not legal parents. Second-parent adoptions are not, however, available in all states.[9]

Second-parent adoptions allow the creation of LGBT-parent families with two recognized legal parents. For example, if one member of a lesbian couple gives birth to a child, she will be recognized as a parent by the operation of law.[10] She and her partner may wish to secure recognition for the partner as a second legal parent of the child. While the partner may be able to adopt the child, an ordinary adoption would require the termination of the first woman's parental rights. Thus, at the end of the day the child would still only have one legal parent, albeit a different legal parent. A second-parent adoption allows the addition of the second woman as a parent without the first woman losing legal status. Once the adoption is completed, the parental status of both women is fully secured.

While the situation just described may be the most common instance where a second-parent adoption is concluded, there are a number of other circumstances where they are useful. If only one member of an LGBT couple completes an overseas adoption (to comply with the laws of the other country), the second person may complete a second-parent adoption upon return to their home state. Similarly, one member of an LGBT couple may complete an adoption in a state where joint adoptions by unmarried couples are not permitted. Here, too, the other member of the couple may be able to complete a second-parent adoption in the couple's home state. Or one member of a gay male couple may claim legal parentage by virtue of his genetic connection to a child born to a surrogate. As with adoption generally, once a second-parent adoption is properly completed, all other states must recognize and respect it.

When a second-parent adoption is completed, the rights of the original parent are necessarily diminished. Before the adoption, the original parent is the sole legal parent. As such, she or

[9]It is difficult to compile a definitive list of the states where second-parent adoptions are permitted, but the Websites noted in footnote 1 are generally kept up to date. In some jurisdictions there are no authoritative precedents or statutes, so the matter may be left to the discretion of individual judges. This means that some judges are sympathetic and supportive and will approve second-parent adoptions while others will not. Overall, second-parent adoptions can be concluded in most major cities even where there is no authoritative legal ruling allowing them, provided one can find a supportive judge. Typically local lawyers are knowledgeable about judicial selection. It is clear that some states do not permit second-parent adoptions. (See the discussion of the North Carolina case above.)

[10]Often she is referred to as a natural parent, but the critical thing here is the operation of law, not nature. The law generally recognizes a woman who gives birth as the mother of a child. The important exception here is surrogacy, which is discussed above.

he stands largely unrivaled when it comes to decision making for the child. In agreeing to a second-parent adoption, the original parent agrees to the recognition of a second-parent who is co-equal. No longer is the first parent's position unrivaled. While there are many substantial reasons why a second-parent adoption is desirable, it is nevertheless important that the original parent, in granting consent to the second-parent adoption, is agreeing to share control of and responsibility for the child. While a second-parent adoption can only be completed with the consent of the original parent, once it is given the consent is irrevocable.

In this regard, second-parent adoptions are quite different from less formal arrangements where a legal parent allows another person to co-parent a child. While in some states the other person may acquire some legal status (see the discussion of de facto parentage, below), in general the person who has not completed an adoption is vulnerable. The legal parent is generally entitled to change her or his mind and terminate the relationship between the co-parent and the child. Drafting a co-parenting agreement may be a helpful tool in delineating the expectations and understandings of the parties, but it will typically not be given legal force.

While many children are raised by single parents or in two-parent families, some children have more than two social parents. One situation where this may arise is where two parents separate and continue to share custody of the child although they live apart. If one or both of those parents repartner, the child may have three or four social parents. Additionally, some children may be part of intact family groups with more than two social parents.

De Facto Parenthood

By now it should be clear that, absent legal action, it is quite possible for a family to consist of one legal parent, one nonlegal parent, and a child or children. This might be the case where only one member of a same-sex couple is permitted to adopt a child or where a woman establishes parental rights by giving birth while no provisions of state law confer similar legal rights on her partner. As has been explained, the nonlegal parent is vulnerable in this situation. There are a regrettably large number of instances where the adult members of couples in this situation have separated and the legal mother has attempted to gain advantage by virtue of being the sole legal parent of the child. Unfortunately this has often been a successful tactic.

In response to these cases a doctrine of de facto parentage was developed. De facto parentage, in its strongest form, grants legal recognition as a parent to a person who has acted like a parent for a substantial period of time. This doctrine exists in a variety of forms in a minority of states. There are no fixed definitions for what it means to act like a parent or for the required period of time, but the test is generally fairly stringent.

De facto parentage is only established after the fact. In all of the cases litigated it was determined after a couple separates. While it provides a potential avenue for a person to continue his/her relationship with a child and may provide full parental rights, it does not give the person parental status *during* the relationship. It is also not clear whether this status is in any way portable, although if a person is determined by litigation to have been a de facto parent in the past, that judgment is very likely binding on other states (Joslin & Minter, 2011).

Establishing status as a de facto parent can be long, contested, and expensive. The court will examine the nature and duration of the relationship between the adult and the child, the extent to which the relationship was encouraged by the legal parent, and a variety of other factors. LGBT legal advocacy groups have worked long and hard to establish and fortify the de facto parent doctrine and where it is well established claiming de facto status may be somewhat more routinized (Joslin & Minter, 2011). But even in the best of the jurisdictions, entering the dispute with status as a legal parent is preferable.

Separating with Children

Law is most important at two points in the life of most LGBT-parent families. First, law matters at the time the family is formed. Second, law matters when the family dissolves, particularly if the adults in the family separate.[11]

It is often difficult for separating couples who have been raising children to reach agreement about the children, yet it is frequently better for all involved to reach agreement rather than choose the path of litigation. This advice is particularly true for LGBT-parent families. Courts are not always hospitable forums for these families. While judges may be receptive to some arguments offered by individual LGBT litigants, some judges are most likely to be receptive to those that will, in the long run, injure LGBT communities. If litigation is necessary, then care should be taken that the arguments raised do not undermine the status of LGBT-parent families generally.[12]

At the time of separation the most critical question for families with children will be whether the people separating are legal parents. If they are, then the case will be handled as a conventional custody dispute. The court will in the end approve a plan for the division of decision-making authority with regard to the child as well as a plan for the child's residence. The plan will be drawn up based on an analysis of the best interests of the child.

If one of the parties is not a legal parent, she or he could be at a substantial disadvantage if her former partner chooses to argue that she should not have any legal rights. Leading LGBT legal organizations have prepared a statement of principles outlining approaches to custody matters that allow the parties to vigorously air their disagreement without harming the communities to which they belong. Consideration of the broader effects of specific arguments that may be offered is warranted.[13]

For example, in 1991 the New York State Court of Appeals decided a case involving lesbian co-parents who were separating Alison v. Virginia, (1991). Though Alison D had acted as a social parent to the child, Virginia M argued that she was not entitled to recognition as a legal parent. The Court of Appeals agreed with Virginia M, and Alison D was found to have no right to maintain contact with the child. Beyond the effect on the parties in this case, the precedent has stood for 20 years and to this day, New York State does not recognize de facto parents. This lack of recognition has undermined the ability of lesbians and gay men to create stable families.

If both the separating parties are legal parents then there is a strong presumption that the child will continue to have contact with both parents and that both parents will continue to be involved with the children, both as decision makers and as sources of financial support. Thus, discussion will focus on allocation of decision-making authority (sometimes called legal custody) and on residential provisions (sometimes called physical custody).

In general, day-to-day decision-making authority is assumed to reside with whomever the child is living with at the time. This allocation of authority is premised on the assumption that day-to-day decisions are small ones. Typically, there is an expectation that major decisions (about elective medical procedures, religion, and education, for example) are expected to be made jointly between the parents even if the parents do not spend equal amounts of time with the child.

Different states may have different starting presumptions for the allocation of residential time with the child. Factors such as the age of the children and the physical proximity of the parents' residences will be important.

As with litigation generally, most custody cases do not go to trial. The vast majority of them

[11]If the adults do not separate, the relationship will eventually end with the death of one or both of the adults/parents. This, too, raises legal questions, but they are beyond the scope of this chapter.

[12]Those considering litigation should carefully consider the points raised in *Protecting Families*, a joint production of GLAD and NCLR that can be obtained at http://www.glad.org/protecting-families.

[13]See note 12.

settle as a result of negotiations between the parties. While the outlines of settlements are no doubt influenced by the governing law, they also reflect the parties' ability to work with each other and reach agreement about what is best for the children involved. Even where the parties separate, they will need to continue to work together as co-parents for the life of the children.

Conclusion

Lesbians and gay men have been creating families with children for several decades, but legal protection of those families is at best imperfect and uneven. While some states recognize relationships between adults as well as those between adults and children, other states refuse recognition. Some legal protections may travel with a family as it moves state to state while others may not. Federal recognition of LGBT families is similarly complicated as parent/child relationships may be recognized while adult/adult relationships cannot be recognized because of DOMA. Thus, in addition to the challenges any family with children confronts, LGBT-parent families confront complex legal questions in many different contexts.

The trend over the last several years is encouraging. More states grant at least some formal recognition to relationships between adults of the same gender. Restrictions on adoption aimed at lesbians and gay men have been rejected by courts and voters. But there is no prospect that all states will progress at the same pace. LGBT families residing in hostile states will likely endure many more years of legal invisibility. The patchwork of laws will remain and thus, for the foreseeable future, LGBT-parent families will need to be aware of potential legal problems that may arise so that these problems can be addressed.

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