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Same-Sex Partners and Family Law: Navigating Marriage Portability, Asset Division, Support and Custody

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Today's faculty features:

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Marriage and Relationship Recognition: National & Federal Overview

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Jurisdictions Within the U.S. Where Same-Sex Couples Can Currently Marry

- California
- Connecticut
- District of Columbia
- Delaware
- Hawaii
- Illinois
- Iowa
- Maine
- Maryland
- Massachusetts
- Minnesota
- New Hampshire
- New Jersey
- New Mexico
- New York
- Oregon
- Pennsylvania
- Rhode Island
- Vermont
- Washington
- American Indian Tribal Nations: Coquille Indian Tribe; Suquamish Tribe; Little Traverse Bay Bands of Odawa Indians; Pokagon Band of Potawatomi; Iipay Nation of Santa Ysabel; Confederated Tribes of the Colville Reservation; Cheyenne and Arapaho Tribes; and Leech Lake Band of Ojibwe

Jurisdictions with Civil Unions or Comprehensive Domestic Partnerships

- California
- Colorado
- District of Columbia
- Delaware
- Illinois
- Hawaii
- New Jersey
- Nevada
- Oregon
- Rhode Island
- Washington

States That Provide Limited Rights to Same-Sex Unmarried Couples

- Colorado
- Hawaii
- Maine
- Maryland
- New York
- Wisconsin

Pending marriage cases

- There are nearly 80 pending state and federal cases challenging state marriage bans, in every state with a marriage ban except North Dakota. For a current list of cases, see: http://www.lambdalegal.org/pending-marriage-equality-cases
- Cases in the Tenth and Fourth Circuits have been fully briefed and argued, and are awaiting decisions at any time. Additional cases are pending on appeal in the Fifth, Sixth, and Ninth Circuits.
- It is likely that one of these cases will be before the U.S. Supreme Court within the next year.

Separated couples

- Separated same-sex couples need to dissolve any legal statuses they have, even if they live in a state that does not recognize their relationship statuses.
- Wyoming has a DOMA but allows married same-sex couples to divorce. *Christiansen v. Christiansen*, 253 P.3d 153 (Wy. 2011).
- California, Delaware, Hawaii, Illinois, Minnesota, Vermont and DC allow non-resident same-sex spouses to divorce as non-residents if they married in that state and live in a state where they cannot divorce. Canada allows non-resident same-sex spouses who married in Canada to dissolve the status of their marriage.
- California and Oregon allows non-residents to dissolve their registered domestic partnerships. Colorado, Delaware, Hawaii, Illinois, and Vermont allow non-residents to dissolve their civil unions.
- We have heard that same-sex couples have been able to dissolved their status in several other DOMA states based on equity.

United States v. Windsor

- In 1997, the federal “Defense of Marriage Act” (DOMA), Section 3 added language to U.S. code providing that :

  In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

  1 U.S.C.A. § 7

- In June 2013, the U.S. Supreme Court ruled in *U.S. v. Windsor* that DOMA section 3 was unconstitutional.
- The Court noted that: "DOMA is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment."

Impact of *Windsor*

- Same-sex couples who live in a state that respects their marriage are recognized as married by the federal government for all purposes.
- Same-sex spouses living in states that do not respect their marriages are recognized by the federal government for many purposes, including:
  - The requirement to file federal taxes as married
  - The right to sponsor a non-citizen spouse
  - Recognition as a family for Medicaid and ACA purposes
  - Full recognition of their marriage by the military for servicemembers
  - Employee spousal benefits for federal employees
  - Other federal spousal rights
- Some federal benefits will most likely not apply to same-sex spouses living in states that do not respect their marriages: Social Security, SSI, Medicare.
- Civil union and domestic partners are not recognized by the federal government for most purposes.

Laws are constantly changing

- For more information about relationship recognition, see *Marriage, Domestic Partnerships, and Civil Unions* by the National Center for Lesbian Rights, www.nclrights.org.
- Contact NCLR for technical assistance and information about your state: info@nclrights.org, 800-528-6257.

MARRIAGES AND RELATIONSHIPS IN NON-RECOGNITION STATES

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I. NEED TO HELP CLIENTS ASSESS WHETHER TO MARRY

- Marriage has consequences now even in non-recognition states: federal taxes, military benefits, federal employee benefits, some retirement plans, etc.
- Marriage has burdens such as possible inability to divorce in state of residence or anywhere else; better to marry in states that take jurisdiction of "wedlocked" marriages, e.g. California, DC, Delaware
- Even if clients marry, their personal values and assumptions may require prenuptial agreement

II. WRITTEN PARTNERSHIP AGREEMENTS STILL ADVISABLE

- Because of fluid nature of marriage law, it is impossible to tell which relationships will be recognized in which jurisdictions, and what choice of law might be
- Parties may not share mainstream assumptions on economic consequences of marriage (e.g., whether all earnings are joint) and would prefer private agreement
- If marriage not recognized, partnership agreement will protect parties in some non-recognition states
- Can treat the issue of what to do if no court will divorce the couple
- Agreements in non-recognition state cannot create tenancy by entireties or other legal title that requires marriage
- Agreements in non-recognition state cannot create an interest in retirement if not covered by ERISA

III. WHAT AGREEMENTS CAN/SHOULD COVER

- What property is considered separate and what joint
- To whom does current income belong
- How debts are paid and who is responsible
- How taxes are filed and paid (consistent with legal restrictions)
- Relationship with children, if any
- Estate planning (e.g. agreement to make wills)
- Who gets what in breakup, including support (similar to prenup)
- What happens if married couple cannot get divorced, or where they can/should divorce, and what law should govern

IV. SEPARATION (DIVORCE) AGREEMENTS

- If non-recognition state will not adjudicate break-up, it may be only method of dividing property
- ADR (including collaboration) is uniquely suited to same-sex break-ups that court will not adjudicate, or not understand if it will adjudicate
- Law may not recognize support/alimony, so must be spelled out clearly
- May need to create enforcement device, like trust deed to secure debts
- Remedies for non-compliance
- Custody requires court action in all jurisdictions
- *Windsor* creates a whole new set of issues for married couples who cannot divorce: how to file taxes; whether you can get QDRO without court-ordered divorce; whether or how to divorce in future

V. PROPERTY DIVISION IN COURT ACTION

- No reason not to attempt to divorce in any state: equal protection, access to courts, equity, imaginative theories
- Some non-recognition state will adjudicate property division on some theory other than divorce. Examples:
  - Alaska (and Oregon before marriage) treats co-habitation as partnership or contract relationship and will adjudicate
  - Washington (before marriage) would adjudicate nonmarital breakups by analogy to divorce
- Other courts may resort to contract, partition, constructive trust, etc.
- Problems of transferability, taxes, etc. exist in judicial (non-divorce) breakup. Issues are different if couple is married than if couple is not married

V. PROPERTY DIVISION IN COURT ACTION (CONT.)

- Couple may own property in both recognition and non-recognition states
- Transfers between spouses/partners on breakup will be taxable if not married, not taxable if married (on the federal level)
- Support may be considered gift for tax purposes if couple not married
- If unmarried, removing one party from mortgage or other debt may trigger "forgiveness of indebtedness" tax on federal level
- Property division should account for extra cost of these problems
- Don't assume anything – changing state/federal landscape means the answers change from day to day
- Create your own enforcement methods if divorce methods are not available

Parentage, Parental Rights, and the LGBT Community

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Introduction

- Increasing numbers of lesbians and gay men are having and raising children together. Children come into these families in a variety of ways, and legal relationships between parents and children can be established through a number of legal approaches. Parentage is almost exclusively determined by state law, which can mean that some jurisdictions protect parent/child relationships in the gay and lesbian community, while others do not. Accordingly, it is a practitioner's duty to become familiar with how the law applies to these families, in order to create the strongest legal protections possible for them.

Marriage

- Very shortly, the most common way for lesbians and gay men to establish parentage of their children will be through marriage. Pursuant to state law, a child born or conceived during the course of a marriage is presumed to be the legal child of both parents. This presumption was recently confirmed by the Maryland Court of Appeals in *Mulligan v. Corbett*, 426 Md. 670 (Md. 2012), in which the Court found that even a blood test to determine actual paternity should not be ordered without first finding that such a test is in the best interest of a child.
- Same-sex married couples who have children born or conceived during their marriage should be given the presumption that the child is a legal child of both parents, notwithstanding a lack of biological connection to the child by one of the parents. Marriage equality states now generally issue birth certificates to married lesbian couples in both parents' names. Although that policy for the most part has not been extended as yet to gay male couples who have children through surrogacy, a strong argument could be made that married gay men have the same right to be named on their child's birth certificate as do lesbian couples by virtue of the existing legal presumption. *See* for example, *In re Roberto D. B.*, 399 Md. 267 (Md. 2007).

Marriage

- As with opposite-sex couples, marriage may confer legal parentage upon individuals who have no intention of taking on the rights and responsibilities of parenthood. For example, if a couple has separated, but are still legally married (perhaps because divorce itself is unavailable or difficult to obtain for any number of legal, financial, or personal reasons), and a child is conceived by or born to one member of the couple, the presumption of parentage will still hold. Conversely, the presumption may not be available to couples in other forms of legal relationships, such as civil unions or domestic partnerships entered into in other jurisdictions.
- Full faith and credit is subject to a "public policy exception," which exempts states from recognizing other states' laws if recognizing those laws would violate their own public policies. Recognition of marriages between same-sex couples is in flux, but 19 states and the District of Columbia currently have marriage equality (as of June 1, 2014) and all states except North Dakota have cases pending that challenge bans on these marriages. (A case is expected to be filed in North Dakota in the next six weeks). Presumably states that do not recognize marriages between same-sex couples would also not recognize parentage rights that devolve from such marriages, civil unions, or sometimes even domestic partnerships. As a result, lesbians and gay men should not rely on marriage alone to establish parental rights to their children as these rights are subject to uncertainty in most of the United States. See, for example, Va. Const. Art. I, § 15-A.

Marriage

- The recent Supreme Court decisions in *Hollingsworth v. Perry*, 570 U.S. _____ (S Ct. 2013) and *United States v. Windsor*, 200 U.S. 321 (S. Ct. 2013), are unlikely to have any dramatic effect on the state level of parental rights established through marriage. *Hollingsworth* essentially reestablished marriage equality in California, thereby allowing same-sex couples to marry and create parental relationships through their marriage. *Hollingsworth* affects only California couples who either married outside of California or wish to marry *in* California. W*indsor*, however, requires the federal government to recognize marriages between same-sex couples. Thus, parental rights devolving from the marriage relationship between a same-sex couple may be recognized on the federal level. Recognition of those rights will be dependent in part on whether the federal government adopts a "place of celebration" or "place of domicile" rule in determining whether the specific benefit is available to the child of a married same-sex couple. The federal government is still in the process of developing those policies post-*Windsor*, but for the most part, the government has adopted a "place of celebration rule," that would permit the federal government to recognize ALL valid marriages between same-sex couples. By extension, one would assume that children born into those marriages would also be recognizes as children of both members of the couple.

Birth Certificates

- It is important to note that birth certificates by themselves do not create legal relationships. Accordingly, even if both parents are named on a birth certificate, the couple should take extra steps to obtain a court order to securely establish their parental rights.
- Nonetheless, birth certificates are important. They may be used as presumptive evidence of a parent-child relationship. Parents submit them on a regular basis for medical care, little league, schools, passports, and other quotidian uses. Generally, they are amended subsequent to court orders to include both legal parents if parents are not initially listed on the birth certificate. See for example, *Davenport v. Little-Bowser*, 269 Va. 546 (Va. 2005), in which the Virginia Supreme Court ordered the Registrar of Vital Records and Health Statistics to issue new birth certificates with both same-sex adoptive parents listed when the children were adopted pursuant to judgments from courts of other states. But see also *Adar v. Smith*, 639 F.3d 146 (5th Cir. La. 2011), cert. denied, 132 S. Ct. 400 (U.S. 2011), where the Fifth Circuit refused to force the State of Louisiana to put both gay male fathers on the birth certificate of a child born in Louisiana who they had adopted in New York.

Adoption

- Adoption is the "gold standard" in determining and protecting parental rights. An adoption results in a court order subject to full faith and credit and comity from other jurisdictions, without a public policy exception. Marriage is generally irrelevant to a grant of adoption. As adoptions are specifically provided for by statute, unlike most other methods of creating parentage through court orders, adoptions are the safest way to protect parental relationships between a non-birth or non-biological parent and his or her child.
- Practitioners should ALWAYS counsel their clients to obtain a second-parent adoption whenever possible, even if the couple is married. Currently, if a marriage is not recognized by a state, parental rights based on that marriage will also not be recognized. However, a court order should always be recognized.
- Although not every jurisdiction provides for second-parent adoptions, the District of Columbia recently expanded jurisdiction for an adoption to be based on the birth of a child in the District, regardless of the residence or domicile of the birth parent, the adoptive parent, or the child. See Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009 (aka D.C. Parentage Act), D.C. Code § 16-909 (2013) (as amended). Several other jurisdictions also provide for jurisdiction to be based on the birth of a child in that jurisdiction.

De Facto Parentage

- De Facto parentage varies from jurisdiction to jurisdiction. Many states have adopted a version of the Uniform Parentage Act that creates legal parentage by statute. Other jurisdictions have very specific statutory provisions for de facto parentage that arte unique to that jurisdiction. The District of Columbia, for example, has a de facto parent statute, D.C. Code § 16-831.03 (2012), that creates a legal presumption of parentage in certain circumstances.

De Facto Parentage

- Other states are dependent on case law that establishes the concept of de facto parentage, or a more stringent standard of "exceptional circumstances." Accordingly, the concept of de facto parentage or "exceptional circumstances" is subject to change. Less than a decade ago in Maryland, for example, a third party (such as a same-sex partner without a legal relationship to a child) could establish parentage by showing that the party was a "de facto" parent. "De facto" parentage could be proven by four factors: 1) the legal parent had consented to and fostered a relationship between the child and the third party; 2) the third party had lived with the child; 3) the third party had "perform[ed] parental functions for the child to a significant degree"; and 4) a parent-child relationship had been forged. See *S.F. v. M.D.*, 751 A.2d 9, 17 (Md. Ct. Spec. App. 2000). However, the Maryland Court of Appeals overturned the principal of de facto parentage and imposed a higher standard upon third parties seeking parental rights and/or visitation in *Koshko v. Haining*, 398 Md. 404 (Md. 2007). The Court found that grandparents (as interested third parties) could not be granted visitation over the objection of the natural parents without a showing of parental unfitness or exceptional circumstances demonstrating harm to the child if the third party's relationship with the child was not continued. Only after this initial finding, the Court held, should a "best interests of the child" analysis be initiated.

De Facto Parentage

- Similarly, in *Janice M. v. Margaret K.*, supra,, the Court overturned a trial court's order for visitation to a woman who had planned for and raised a child with her partner, despite the fact that she fit the criteria of a "de facto" parent. The Court again held that a "third party" must prove exceptional circumstances in order to obtain visitation, and that such visitation would be in the best interests of the child. The exceptional circumstances standard requires a finding of de facto parentage AND that either the legal parent is unfit or that a failure to grant visitation would result in harm to the child. This standard is exceedingly difficult to meet, and Margaret K. lost all contact with her child when the trial court found that Janice M., the legal parent, was so opposed to the child's visitation with Margaret K. that the visitation was not in the child's best interest.
- Like many states, Maryland lacks any statutory guidance in the area of parentage. Virginia, like Maryland, has approached parentage largely through case law, and has a very similar standard for "third party" custody and visitation. See, e.g. *Stadter v. Siperko*, 52 Va. App. 81 (Va. Ct. App. 2008).

Assisted Reproductive Technology (ART)

- Increasingly, lesbians and gay men are using assisted reproductive technology (ART) and alternative forms of reproduction, such as surrogacy, in order to have children together. Numerous methods of alternative reproduction exist, with both known and unknown egg and sperm donors and gestational and traditional surrogates. A gestational surrogate does not have a genetic connection to the child she is carrying, while a traditional surrogate does. In recent years transfers of ova between lesbian partners with one woman carrying the other woman's egg have become common, as has the mixing of sperm by gay male couples who engage a surrogate.
- Some U.S. courts have developed new law in light of these new technologies: in *T.M.H. v. D.M.T.*, 79 So. 3d 787 (Fla. Dist. Ct. App. 5th Dist. 2011), a Florida court of appeals found that a woman in a lesbian relationship who had assented to her egg being placed in her partner's womb for gestation had not thereby given up her parental rights, despite having signed a contract with a fertility clinic agreeing to do so. The Court found that it was the intent and agreement of the parties that both she and her partner have legal, parental rights over any children born of that egg. Similarly, in *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005), the California Supreme Court found that both women in a lesbian relationship (the woman whose egg was implanted in her partner's womb and the woman who gave birth to the child) were the legal parents of their twin daughters resulting from the pregnancy. Nonetheless, practitioners should insure that their clients *do not* sign fertility clinic documents waiving parental rights to children born from their ova.

Assisted Reproductive Technology (ART)

- Courts in other jurisdictions without ART statutes have issued opinions devastating to intended parents: in *A.G.R. v. D.R.H. & S.H.*, twin girls were conceived through the sperm of one man in a gay partnership and a donor egg implanted in a gestational surrogate (the sister of the other partner), 2009 N.J. Super. Unpub. LEXIS 350 (Ch. Div. Dec. 23, 2009). In this case, the sister, although she had no genetic relationship to the twins, was found to be a legal parent to the children. A trial court judge ultimately determined that it would be in the best interests of the children to be in their biological father's custody, but the harm to this family has been profound. See also *In re Baby M.*, 109 N.J. 396, 537 A.2d 1227 (N.J. 1988) (in which the New Jersey Supreme Court found that despite an agreement among the parties, traditional surrogacy is against the state's public policy).

Agreements

- Contracts in which parties have agreed orally or in writing to accept or relinquish parental rights may also be upheld by courts and thus establish parental rights. These contracts run the gamut from co-parenting agreements (which are executed most often when one or both partners are not biologically related to the child or children) to agreements signed by sperm donors or egg donors to relinquish their parental rights. Curts around the country have begun to find that these agreements create or terminate parental rights and responsibilities. In *Frazier v. Goudschaal*, 296 Kan. 730 (Kan. 2013), the Kansas Supreme Court enforced a co-parenting agreement between a separated lesbian couple with two children conceived by artificial insemination, finding that the woman who had no biological connection to the children was still guaranteed certain parental rights under the terms of the agreement. This case, and others like it, demonstrate the increasing importance of the intent of the parties involved in determining who is a parent in the eyes of the law.

INTENT

- The D.C. Parentage Act, *supra*, also reflects the trend in parental rights to consider intent of the parties in establishing parentage. The Act, which specifically addresses the parental rights of lesbian couples (surrogacy is illegal in the District of Columbia, D.C. CODE
- §§ 16-401, 402), is based on intention over biology in parentage. Many other jurisdictions have adopted some form of the Uniform Parentage Act (UPA), a model Act which addresses subjects from ART to intended parents and provides language as to who is a legal parent under state law. These statutes often make it easier for lesbians and gay men to establish parentage.
- The notion of intent determining parentage is actually not that unusual. Adoption statutes are based on the idea of intent to parent, as are presumptions of parentage created through marriage. When courts uphold ART agreements and co-parenting agreements, they look to the intent of the parties as to parentage. Pre- and post-birth orders also depend on the intent of the parties. In the future, it is likely that the principle of intent will become even more dispositive of parental rights. Thus, practitioners must be mindful of the tangible evidence or statutory presumptions that may be useful to demonstrate intent.

Court Orders

- While the above are all paths to parentage, the surest protection for parental rights is a court order that finds that both members of a same-sex couple are a child's legal parents. Such orders may be adoptions, as addressed earlier, or may be obtained before a child is born (Pre-Birth Order) or after a birth (Post-Birth Order), particularly in cases of surrogacy or other ART procedures. Many states have no statutory basis for pre- or post-birth orders; the orders are based on a court's equity powers. Generally in such matters consent petitions are filed and courts review all agreements involved in the ART procedures, as well as affidavits from the parties and reproductive endocrinologists, prior to the issuance of the order. After the order is issued and the child is born, the child's birth certificate, as in an adoption, is amended to reflect the child's legal parents.

Court Orders

- Pre- and post-birth orders have been recognized and enforced by numerous state courts and have been upheld as a matter of equity when parentage is challenged. In *Berwick v. Wagner*, 336 S.W.3d 805 (Tex. App. Houston 1st Dist. 2011), a Texas court of appeals upheld a pre-birth order issued in California, which named two gay men as the legal parents of a child born through a surrogate, despite the state's general lack of recognition of same-sex relationships. The court found that the order was a child custody determination deserving of full faith and credit. Similarly, in *Kristine H. v. Lisa R.*, 117 P.3d 690 (2005), the California Supreme Court upheld a pre-birth order declaring that both lesbian partners were the legal parents of the child they had conceived through artificial insemination. Just last year, a Virginia Circuit Court officially domesticated a pre-birth order issued in California recognizing two lesbian partners as legal mothers of their child on the birth certificate.

Court Orders

- It is instructive to read the long and tortured history of *Miller v. Jenkins*, 2006 VT 78 (Vt. 2006); 49 Va. App. 88 (Va. Ct. App. 2006); 2007 Va. App. LEXIS 158 (Va. Ct. App. Apr. 17, 2007); 276 Va. 19 (Va. 2008); 555 U.S. 1069 (U.S. 2008) (denying cert.) (some citations omitted), a case where a lesbian couple moved from Virginia to Vermont, entered into a civil union, and then had a child together. Like many couples, they subsequently separated. But the key element of this case is that they then obtained a custody order from a Vermont court. The biological mother moved back to Virginia, rejected her lesbian relationship, and refused to allow the non-biological mother to visit with the child. Years of litigation ensued, with an opinion from the Virginia Supreme Court upholding the Vermont court order. The biological mother and child later disappeared. The Vermont court eventually changed custody from the biological mother to the non-biological mother because of the biological mother's refusal to follow the initial custody and visitation order. Had the non-biological mother's parental rights depended solely on the parties' civil union, it is almost certain that Virginia courts would have found that the she had no rights to her child as Virginia does not recognize marriages, civil unions, or domestic partnerships between same-sex couples. See Va. Const. Art. I, § 15-A.

Full Faith and Credit and Comity

- Court orders are most critical in states without marriage equality, de facto parentage, a UPA, or other parentage statutes or case law that includes parental rights for lesbians and gay men. No "public policy exception" to full faith and credit exists for judgments from other jurisdictions. A court order is a judgment deserving full faith and credit with no exceptions. We are aware of only one case in which a judgment was refused enforcement by another state's court (see *Adar v. Smith*, 639 F.3d 146 (5th Cir. La. 2011) *cert. denied*, 132 S. Ct. 400 (U.S. 2011)). But see, e.g. *Berwick v. Wagner*, 336 S.W.3d 805 (Tex. App. Houston 1st Dist. 2011). Accordingly, lesbians and gay men should obtain court orders establishing their parental rights whenever possible.

Immigration Issues

- Parents in the LGBT community must be exceedingly careful when using ART abroad to bring children into their families. In a case involving an unmarried US citizen, a woman living abroad, who received an embryo legally in another European country than the one she was living in (no data provided as to source of egg and sperm) and who gave birth to a child in Europe --- the child was stateless under applicable law of the birth country, but obtained a travel document from the authorities in the birth country. The U.S. embassy would not issue a U.S. passport to the child due to its ART position that U.S. citizenship must be based on a genetic connection between a U.S. citizenship parent and child. Basically, child born out of wedlock with no genetic material from a U.S. citizen would not be granted U.S. citizenship. However, the U.S. government recently changed its position in this regard. "'These improvements are being made to provide a gender neutral description of a child's parents and in recognition of different types of families,' the State Department said...." Full article: http://www.mysinchew.com/node/50160

- State Department press release: http://www.state.gov/r/pa/prs/ps/2010/12/153636.htm

Immigration Issues

- U.S. citizens who wish to adopt from a foreign country MUST comply with the requirements of the Hague Treaty on Adoption, if both the U.S. and the "sending" country are signatories to the Treaty. Even if a country is not a signatory to the Hague Treaty, certain immigration requirements must be met before an adopted child will be allowed into the U.S. Adoption in a foreign country does not automatically bestow U.S. citizenship on a child, even if the adoptive parents are U.S. citizens.
- In addition, a foreign-born adopted child will not be entitled to derivative U.S. nonimmigrant visa status unless the child meets certain criteria. In practice this means that U.S. citizens and long term nonimmigrant visa holders cannot adopt overseas and immediately bring the child back to the United States without complying with all immigration requirements (unless certain very unusual circumstances are met), in addition to becoming legal parents of a child.

Importance of Parental Rights

- It may not be immediately clear why it is so important to clearly and legally establish parentage when a challenge to parental rights appears unlikely. The first and most obvious response to this point is that a challenge never seems likely until it occurs; people are unlikely to believe that their marriages or partnerships will end, or that a donor or surrogate with whom one has a good relationship will assert parental rights. However, even if no challenge occurs, parentage is crucial in a number of other important areas. If legal parentage has been established, a child may receive social security benefits from a parent or inherit should the parent die without a will (or contest a will as an intestate heir). A legally established parent can take steps to determine guardianship of a child upon the other parent's death or incapacity, and can ensure that the child does not end up a ward of the state. Even before a child is born, legally established parentage makes clear who is a child's parent. As intended parents, birth parents, and biological parents may all be different and all may believe they have some rights over a child, a clear determination of parentage can avoid acrimony, costly litigation and family upheaval, and ultimately serve the best interests of the child.

Conclusion

- The relationships between parents and children are not at heart legal relationships. The time, love, and caregiving that goes into creating and strengthening the parent-child bond cannot be created or destroyed by a judgment or decree. However, establishing legal parentage protects that bond from interference from the state, other individuals, and the legal system itself, and ensures that parents can exercise their rights to raise their children without fear or unnecessary restriction. Whether the method of conception is traditional or alternative, the children older or not yet born, the processes outlined in this article help lesbians and gay men establish their parental rights and ensure that their families can thrive whether they remain together or their family structures change, wherever their lives may take them.

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