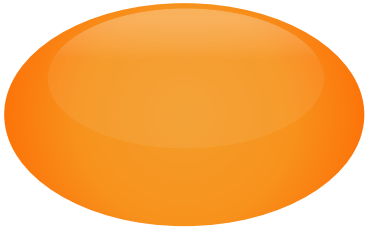


LGBTQ Family Formation Law & Reproductive Rights

LexVid 2023



PRESENTED BY:

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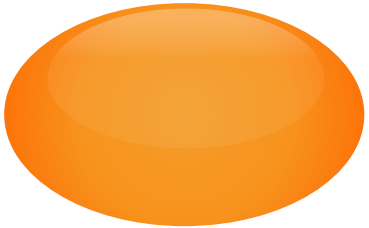
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PART I – HISTORICAL ISSUES CONFRONTING LGBTQ CLIENTS IN THE AREAS OF FAMILY LAW AND REPRODUCTIVE RIGHTS & RECOGNIZE ADDED MEASURES NECESSARY TO PROTECT AND SAFEGUARD LGBTQ FAMILIES

FOUR WAVES OF LGBTQ FAMILY FORMATION*

Wave One (Pre 1970's/Pre-Stonewall Court Riots)

- –LGBTQ individuals primarily had children through heterosexual marriage or other means
- – Families often lived in secret or hid their relationships

*This historical information is set out in much greater detail in the law review article written by me for the University of Richmond School of Law "Riding the Storm Out After the Stonewall Court Riots"- fee free to email me for a copy.

WAVE TWO (1970'S - 1980'S)

- Many LGBTQ families adopted children in foster care
- Gay marriage + adoption intertwined
- Joint adoptions were rare, most adoptions were by a single LGBT parent, some second-parent adoption
- Legal landscape = uncharted + messy – state laws varied widely

KEY EVENTS DURING WAVE TWO

- 1977 – Formation of the National Center for Lesbian Rights
- 1978 – Washington State Supreme Court issued county's first custody rule in favor of lesbian couple (*Schuster v. Schuster*)
- 1979 – Gay couple in California become first to jointly adopt a child

WAVE THREE (1980'S - 1990'S)

- Assisted Reproductive Technology (ART) becomes more popular
- Self-insemination with every-day objects (ex. eye dropper, turkey baster, "Our Bodies, Ourselves")
- Gay men often the source of sperm
- Sperm banks began to develop
- Fertility options and clinics became more advanced for straight couples

KEY EVENTS DURING WAVE THREE

- 1982 – Sperm Bank of California opens
- 1985 – Second-parent adoption case in Alaska
- 1986 – NCLR wins high-profile second-parent adoption case
- 1986: – *Bowers v. Hardwick* –SCOTUS says sodomy laws can be enforced by states
- 1988 – Artie Wallace case –NCLR wins custody fight by AIDs infected parent in CA
- 1988 - Children of Lesbians and Gays Everywhere (COLAGE) formed as an independent national organization

WAVE FOUR (1990 – 2016)

- LGBTQ families being formed garner more publicly, which created backlash
- Child welfare organizations began to study the "fitness" of LBGTQ families
- Gay marriage banned by DOMA… and then overturned in 2013 and legally recognized
- 2015 – after *Obergefell* in 2015 it became easier for LGBTQ couples to adopt jointly (happened sooner in VA as of Oct 2014)

KEY EVENTS DURING WAVE FOUR

- 1996 -- *Romer v. Evans* – SCOTUS strikes down Colorado law
- 1997 – New Jersey becomes first state to allow same-sex couples to jointly adopt after class action lawsuit
- 2003 – *Lawrence v. Texas* – SCOTUS rules sodomy laws unconstitutional
- 2008 – California Supreme Court rules for marriage equality

KEY EVENTS DURING WAVE FOUR

- October 10, 2009 at The Human Rights Campaign Dinner: First explicit mention of same-sex parents in a presidential proclamation by President Obama:



"You will see a time in which we as a nation finally recognize relationships between two men or two women as just as real and admirable as relationships between a man and a woman. You will see a nation that's valuing and cherishing these families as we build a more perfect union — a union in which gay Americans are an important part."

KEY EVENTS DURING WAVE FOUR

- 2010 - Florida is the last state to overturn an explicit statutory ban on adoption by gays and lesbians
- 2013 – *U.S. v. Windsor* - SCOTUS strikes down Section 3 of DOMA
- 2014 – *Bostic v. Schaefer (Bostic v Rainey)* – SCOTUS denies cert of 4th Circuit ruling – striking down VA law banning same-sex marriage
- 2015 – *Obergefell v. Hodges* – SCOTUS rules fundamental right to marry granted under the Equal Protection and Due Process Clauses
- 2016 – federal judge strikes down Mississippi law banning same-sex adoptions
- 2016 - *VL v EL* – SCOTUS rules adoption orders must be given full faith and credit by other states
- 2017 – *Pavan v. Smith* – SCOTUS rules marriage equality means children of same-sex marriage have the right to be legal parents and both on the birth certificate.

BEFORE MARRIAGE EQUALITY

- Adoption by both was limited – in most states only one same-sex parent could adopt
  - –Home studies listed spouses as roommates
  - –Difficult to become foster parents
  - –Joint custody was the only option if both could not adopt but not the same as rights as being a legal parent

BEFORE MARRIAGE EQUALITY

- Assisted reproductive technology:

  - Gay men using a surrogate – but often could only get the biological dad declared the legal dad.

  - Lesbian couples using donor sperm - non gestating parent often 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

  - Creative lawyering required in non-recognition states. For example, reciprocal IVF case - one parent gestational mom and one genetic mom - used parentage statutes and EPC/DPC arguments in VA to get Order of Parentage as to both.

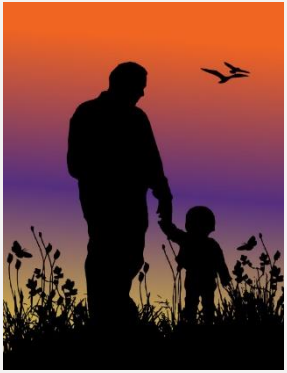
  - Also used EPC/DPC arguments and Parentage Act in Virginia to get single dad using gestational carrier order as the sole parent without doing an adoption.

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



SINGLE DAD – NO NEED TO ADOPT OWN CHILD

- ***IN RE.: The Determination of Parentage and Non-Parentage and Amendment of Birth Certificate of Otto Thomas Harris, a minor, By Leonard Harris*** (Henrico Cir. Ct. 12/17/15)
- Court entered an Order of Parentage as to single genetic dad using a gestational carrier along with an Order of Non-Parentage as to the non-genetic gestational carrier (donor egg was used). This removed the Gestational Carrier from the birth certificate and any parentage without the single dad having to do a single parent adoption. Equal Protection arguments used if single mom using a gestational carrier could use Parentage action and not have to do a single parent adoption than single dad should be afforded same procedure.




YOU MAY NOW KISS THE SUPREME COURT.
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After marriage equality in 2015:

- Adoptions – Same-sex married couples able to adopt together + do step-parent adoptions
- ART – Children born to married same-sex couple through sperm/egg donation, or use of gestational carrier/surrogate now children of both parents
  - But ongoing court issues + unconstitutional gendered statutory language remained - & still remain

State [Un]-Constitutions ON marriage:

Many state constitutions still refer to marriage as between a man and woman. Examples include:

- Alabama (Article I Sec. 36.03(b))
- Alaska (Article I Sec. 25)
- Arizona (Article XXX Sec. 1)
- Arkansas (Constit. Amend. 83, Sec. 1)
- Florida (Art. 1, Sec. 27)
- Virginia (Art. 1, Sec. 15-A; Marshall Newman Amendment Nov. 2006)

Faith based organizations:

- In many states, faith based licensed adoption agencies can still legally discriminate against LGBTQ families
- Virginia Code §63.2-1709.3, Conscience Clause; private agency not required to do any adoptive placement in violation of its "written religious or moral convictions or policies."
- Other states include: Alabama, Kansas, Mississippi, North Dakota, Oklahoma, South Carolina, South Dakota, and Texas.

For example - Virginia code section:

§ 63.2-1709.3. Child-placing agencies; conscience clause

A. To the extent allowed by federal law, 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.

B. The Commissioner shall not deny an application for an initial license or renewal of a license or revoke the license of a private child-placing agency because of the agency's objection to performing, assisting, counseling, recommending, consenting to, referring, or participating in a placement that violates the agency's written religious or moral convictions or policies.

C. A state or local government entity may not deny a private child-placing agency any grant, contract, or participation in a government program because of the agency's objection to performing, assisting, counseling, recommending, consenting to, referring, or participating in a placement that violates the agency's written religious or moral convictions or policies.

D. Refusal of a private child-placing agency to perform, assist, counsel, recommend, consent to, refer, or participate in a placement that violates the agency's written religious or moral convictions or policies shall not form the basis of any claim for damages.

Many State Statutes Still are not all Gender neutral –Including Virginia

- Virginia Code Commission project dropped
- Pregnancy assistance provisions would have been substantively changed if applied to transman with reproductive parts
- Anyone hear of a “nibling?”
- This year proposing legislation to fix remaining “mother/father” issue in VA adoption statutes.

State of the law since *Obergefell v. Hodges:*

- ALL married couples are entitled to have their marriage recognized.
- However LGBTQ couples still encountered 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 still need an Order. Ideally adoption order over order of parentage.

Examine Pavan v Smith:

- **Arkansas and U.S. Supreme Court – *Pavan v. Smith*, 136 S. Ct. 2075 (2017).**
  - Two sets of same sex female couples had children through IVF with anonymous sperm donor
  - Non biological parents sought to have names put on birth cert, Dept of Public Health said no
  - Circuit court said it was unconstitutional, Dept of Public Health appealed
  - SCOTUS reversed saying no, res judicata, and saying *Obergefell* only applied to marriage, not parenting
  - Decision will require court order for both spouses in a married same sex couple to be entered onto birth certificate
  - BUT opinion establishes that with a court order the parentage will be secure

Example Case in Chesterfield Cir Court – argued Oct 6, 2016

- Court wanted hearing; Brief accepted in lieu of hearing
- Court denied second parent adoption because parents were married when child was born
- Filed Motion for Reconsideration and set for Hearing prior to appeal deadline
- After hour of hearing – judge (thought was doing us a favor – "why should a parent have to adopt her own (non-bio) child?") – because the presumption is rebuttable! (**explained case of ten year old whose dad was not the bio dad**, sperm donor challenges, etc.)
- Finally entered the Order



And consider this important decision (I attach this one to my briefs):

- **New York – *Matter of L et. al.*, 2016 NY Slip Op 31868, Family Court Kings County (Oct. 6, 2016). http://courts.state.ny.us/Reporter/pdfs/2016/2016_31868.pdf**
  - Issued decision saying married lesbian couples are entitled to second parent adoption for security of their children

Why Same-Sex Couples Cannot Really 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 by 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
    - Ethically advise couples of the right to separate legal counsel



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

All same-sex couples were advised to have the following in place:



- Advanced Medical Directive (Living Will)
- General Durable Power of Attorney
- Burial Designation
- Last Will & Testament (and if have children or plan to have then with Guardianship and Trust provisions)
- Jointly titled real estate, vehicles and accounts

Even with marriage equality:



- Same-sex couples **still should have all those documents in place** (a) esp if not married and (b) even if married because they are recommended anyway for heterosexual couples
- Now, however, hospitals and medical providers are required to recognize and acknowledge same-sex spouses in making medical decisions rather than the spouse having to rely on an Advanced Medical Directive

What are the Implications of the 2022 SCOTUS ruling in *Dobbs*?

- The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* (2022) to overturn federal constitutional abortion protections found in *Roe v. Wade* (and leave it up to state legislation) has alarmed the LGBTQ+ community – are their rights in jeopardy?
- See https://legalaidatwork.org/what-the-supreme-courts-dobbs-decision-means-for-lgbtq-rights/
  - The LGBTQ+ community disproportionately accesses reproductive health care.
  - LGBTQ+ people also are potentially affected by the *Dobbs* decision because of the shared constitutional basis between reproductive and many LGBTQ+ rights.

Concern re *Dobbs* Ruling:

The Fourteenth Amendment's Due Process Clause creates a legal concept known as "substantive due process," which protects the right to "liberty." The right to privacy—which is the bedrock for abortion rights (*Roe* and *Casey*), same-sex sexual intimacy (*Lawrence v. Texas*), and same-sex marriage (*Windsor v. United States* and *Obergefell v. Hodges*) —is embedded in the liberties that people are entitled to under the Constitution. For nearly 50 years, the right to privacy safeguarded peoples' autonomous decision-making over the most personal life choices. However, the Supreme Court ruled in *Dobbs* that the Fourteenth Amendment's substantive due process protection of liberty does *not* include a federal right to abortion.

Concern in the concurrence By Justice Thomas

- Justice Thomas stated in his concurrence in *Dobbs* that the Court should reconsider *all* of its substantive due process precedents. And although the majority opinion states that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion," the majority's eagerness in *Dobbs* to overturn as significant a precedent as *Roe* has alarmed other communities whose rights stem from the legal principles underlying *Roe, especially the LGBTQ community*.
- Ironically, while Justice Thomas suggests revisiting *Obergefell* and same-sex marriage – another case in the line of precedence to be overturned would be *Loving v. Virginia* – putting bi-racial marriage also in the line of attack; Justice Thomas is in a bi-racial marriage.

Where Does This Leave LGBTQI families in Family Formation?

- Back to adhering to all safeguards: secure legal parentage via adoption or order of parentage – do not rely on a birth certificate alone
- Recommend even if married – have an Advanced Medical Directive and General Power of Attorney naming one's spouse.
- Like all families – have Wills and Trusts in place naming Guardians and Trustees for any children. Expressly include children by adoption and order of parentage.

PART II – UTILIZE THE LAW CREATIVELY IN REPRESENTING LGBTQ CLIENTS & ADVOCATE FOR CONTINUED CHANGES AND PROTECTIONS IN THE AREA OF LGBTQ FAMILY-BUILDING

LGBTQ ADOPTION/ART – ongoing issues

- Sperm donation + not obtaining proper release
  - Turkey baster *Boardwine* case (out of Roanoke, VA to VA Court of Appeals)
- Non-LGBTQ friendly fertility clinics – however, ASRM has strongly addressed this issue
- Same-sex couples still need a court order and cannot rely on just a birth certificate
- Using donor embryo and a gestational carrier
  - Timmons-Olson + "Jacob's Law" in VA effective 7-1-19

Jay Timmons and Rick Olson: JACOB's Law





Jacob's Law – changes to Virginia code section 20-156, et. seq. (7.1.2019)

- Made Virginia's surrogacy statute gender neutral
- Other spouse of child born through ART is the presumed other legal spouse (now gives statutory authority for birth certificate form signed at the hospital to put other mom on the birth certificate when using sperm donor)
- Use of donor embryo now permitted – presented as Pro-Life Bill!!
- Provides for single Intended Parent (before needed to be married couple as in man and woman)
- Clarifies only traditional or true or genetic surrogate can void the contract and keep the child.
- Still does not provide for a court order – will still need to use parentage act or declaratory judgment or declaration of parentage – to get court order

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

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

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”



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”

They WILL PREVAIL despite non-user friendly documents.



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

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.

Gestational Mom & Genetic Mom

- Must Have a (Parenting and) 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 an as 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 the (Parenting and) 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".*

With Same-Sex Marriage – Came 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 = marital property
- Absent a pre-nuptial or post-nuptial property settlement agreement and donor release – this is joint marital 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

Donated Embryos:



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

by William Hamilton

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 donors AND recipients and then ALSO 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/recipients (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.**

Just another example - Why You Need to Ensure There are Clear Gamete Donor Agreements-Releases:

Texas – ***In the interest of PS*, No. 02-16-00008-CV (Tex. Ct. App., 2016). https://caselaw.findlaw.com/tx-court-of-appeals/1752229.html**

- Man verbally agreed to provide sperm to a friend
- Was used for artificial insemination
- He didn't qualify as donor so became the parent
- **Holding**: Upheld trial court and said Bio dad did not provide sperm through a physician so he is the father b/c he doesn't meet definition of a donor

Advising Clients:



- Keep eggs and sperm separate if they can – this keeps ownership clean
- Viability of egg freezing is now excellent
- Doctors can easily form embryos from separate gametes

Co-parent adoption without marriage – still an issue in some states:

- Equality VA re-submitted the second parent adoption bill for non-married parents for several years from 2015 to 2018 and submitted again in 2021
- It fortunately passed going into effect July 1, 2022 – making a person with a legitimate interest able to adopt
- Thus marriage now is not a defining factor
- But - not all states have second parent adoption



States and Countries recognizing Three or More Parents by Statute:

- California - statute
- Maine - statute
- Washington – statute (UPA)
- Vermont – statute (UPA)
- Nevada - statute
- Louisiana – by statute and prior case law
- Connecticut – by statute
- Canada – by statute in Ontario and prior case law
- Brazil – case law affirming prior statute
- Note: this list may not be exhaustive or fully up to date - and does not include states that have some cases or case law allowing three parents – e.g., Massachusetts, Minnesota and others.

Multi-Parenting by Design versus by Default.

By Design: 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- or multi-parenting by design" has developed.

Multi-Parenting by Design versus by Default.

By Default: There also, on the other hand, are cases where there is multi-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 via the product of an extra-marital affair). These default case outcomes, even where ART was not involved, still are relevant to whether multi-parenting arrangements will be upheld.

Notable Multi-Parenting Case:



D.G. v. K.S., 444 N.J. Super. 423, 133 A.3d 703 (Super. Ct. 2015) is a case decided by the New Jersey Superior Court, Chancery Division, Ocean County, 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.

D.G. v. K.S., 444 N.J. Super. 423, 133 A.3d 703 (Super. Ct. 2015) (cont.)

- The court upheld the tri-parenting agreement on the grounds that the non-bio dad was the psychological parent, 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. Id. at 58. 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." Id.
- 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. Id. at 61-62. 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." Id. at 62. The court then proceeded to assess the child support obligations as between the two biological parents

And compare – multi-parents by default:

- In J.W.S. v. E.M.S., 2013 Del. Fam. Ct. LEXIS 27 (2013), 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 Del. Code Ann. tit. 13, § 8-606(e) (2012).
- An adjudication was proper as 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 found that recognition of both male petitioners as fathers was in the child's best interest, as 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.” Id. At 23.
- Moreover, the court was able to rely on the Delaware statute for recognition of a de facto parent. Under 13 Del. C. §8-201, 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.
- In rendering the decision that all three were equal legal parents, the court referenced a prior decision, A.L. v D.L., 2012 Del. Fam. Ct. LEXIS 83, 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.

- Gender identity and sexual orientation now are protected classes under Title VII (employment setting for employers with 15 or more employees)
- How did that Happen?
- US Supreme Court ruling BOSTOCK v. CLAYTON COUNTY, GEORGIA, cert from THE ELEVENTH CIRCUIT
- No. 17–1618. Argued October 8, 2019; Decided June 15, 2020
- Actually was a combination of three cases on appeal

Sexual Orientation-Gender Identity discrimination now protected

- In a historic decision, the U.S. Supreme Court ruled that the 1964 Civil Rights Act protects gay, lesbian, and transgender employees from discrimination based on sex. The ruling was 6-3, with Justice Neil Gorsuch, President Trump's first appointee to the court, writing the majority opinion. The opinion was joined by Chief Justice John Roberts and the court's four liberal justices.
- "Today," Gorsuch said, "we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear." He found such discrimination is barred by the language in the 1964 law that bans discrimination in employment based on race, religion, national origin or sex.

But Discrimination Persists:

- *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*.
- Decided by SCOTUS in 2018
- Baker refused to bake cake for gay couple in violation of CO law
- Court held that owners of public accommodations can refuse certain services based on the First Amendment claims of free speech and free exercise of religion, and therefore be granted an exemption from laws ensuring non-discrimination in public accommodations— okay to refuse to provide creative services, such as making a custom wedding cake for the marriage of a gay couple, on the basis of the owner's religious beliefs.



303 CREATIVE LLC ET AL. v. ELENIS ET AL.

In this 2023 SCOTUS decision, a six-justice majority agreed that Colorado cannot enforce a state anti-discrimination law against a Christian website designer who does not want to create wedding websites for same-sex couples because doing so would violate her First Amendment right to free speech.

And other countries are way behind:

- As of now, at least thirty-four countries and territories allow same-sex marriage.
- Mexico now recognizes same-sex marriage in all states (since October 2022) but not all of the states honor same-sex adoption.
- While most of the countries that recognize gay marriage, besides the United States and Canada, are in Western Europe, Italy recognizes same-sex unions but not marriage; and Switzerland only has recognized same-sex marriage since 2022. Estonia will recognize same-sex marriage starting in 2024 and Cuba, Andorra and Slovenia were added in 2022.
- The lack of many countries (especially in Africa and Asia) to recognize and honor marriage as between same-sex couples makes travel to or residing in such countries somewhat prohibitive for LGBT families and also allows room for one parent to move to such non-recognition countries in an attempt to disadvantage the other parent—just as we have seen occur in the United States.

Perpetuate Creative Lawyering & Advocacy:

- Not sure what the future holds – political climate & recent US Supreme Court Nomination (with RBG gone)
- Many LGBTQI persons are concerned that future SCOTUS rulings might "undue" recent favorable rulings – e.g. *Dobbs*
- Important to understand client anxiety
- Now more important than ever to be creative and be an advocate!


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

Questions?

