Do Lesbian Mothers Still Have to Adopt Their Own Children Now That DOMA Has Been Declared Unconstitutional?

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NOTE: This article does not address issues for lesbian couples adopting children from outside their union. Instead, it addresses the issues facing lesbian couples having children together, as couples. Changes in family law mean that many lesbian couples having children together are automatically recognized as parents in their home states without a court proceeding; thus the question arises: do I still have to do an adoption, even if my state (and my child's birth certificate) already says I am a parent?

In the last decade, an increasing number of states have passed laws that provide legal protection to same-sex unions. Although these states are taking different approaches—some allowing same-sex couples to marry, while others provide alternatives to marriage such as domestic partnerships or civil unions—in many of these states any children born into the legally recognized unions are treated as the children of both partners as a matter of law. Because of these progressive state laws, lesbian couples giving birth in approximately ten states (and counting) can get original birth certificates listing both partners' names as parents, instead of only the name of the birth mother. This is a huge victory for lesbian couples and, especially, for their children.

With the United States Supreme Court having ruled that section 3 of the federal Defense of Marriage Act (DOMA) is unconstitutional, and that no party has standing to petition for review of the federal district court's ruling on the unconstitutionality of Prop 8, many people believe that recognition of same-sex unions may soon be the law of the land. Given this historic moment, I am hearing from many lesbian clients asking: "Now that DOMA has been ruled unconstitutional, do I *still* have to adopt my own child?"

Sadly, the answer is YES.

Even though the Supreme Court has found section 3 of DOMA unconstitutional, that statute only prevented the federal government from recognizing the marriages of same-sex couples. The other part of DOMA—the part that says that each state can set its marriage rules for itself, and that no state has to recognize another state's marriages that offend the first state's public policy—is unlikely to fall any time soon. And honestly, that part of DOMA is just a reiteration

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of longstanding legal principles: states have *always* been able to set their own rules about who can marry, and have *never* had to recognize each other's marriages. While this no longer is true for interracial marriages, due to *Loving v. Virginia*, it remains true for underage marriages and marriages between cousins.

The full faith & credit clause of the United States Constitution—which is what makes judgments portable from state to state—does not protect *statuses*. This is why states don't have to honor each other's marriages—being married is a *status*. So is being a parent. But if you have a judgment saying you are a parent, then that *judgment* is entitled to full faith & credit in every state in the country and—under international treaties—in many countries around the world. Therefore, in order to make parental status portable from state to state and from country to country, lesbian and gay parents will continue to need to make certain they have court judgments saying they are parents, even with DOMA off the books.

We have a graphic example in our national community of why court judgments are essential: In *Miller-Jenkins v. Miller-Jenkins*, the State of Virginia refused to recognize the parental rights of the non-biological mother of a child born to a lesbian couple who entered into a civil union in the State of Vermont before the child's birth. The Virginia trial court refused to acknowledge the parent-child relationship despite the fact that the child was born into an intact Vermont civil union. Thankfully, the Virginia trial court decision was overturned on appeal, since a Vermont family court had already taken jurisdiction over the case and entered custody and support orders prior to the matter being filed in Virginia. But absent a court judgment from Vermont, entitled to full faith and credit in Virginia, Janet Jenkins would not have been her daughter's parent in Virginia despite the presumption that made her a parent in Vermont as a result of the civil union.

The bottom line is that lesbian and gay parents cannot rely on recognition of their adult relationships (e.g. marital, civil union, or domestic partnership presumptions) as the basis

for recognition of their relationships with their children. Each parent must do diligence to establish an independent legal relationship with his or her child that *does not depend on* recognition of her/his relationship with her/his spouse/partner. That is the reality of the world we currently live in and is likely to remain the reality for some time to come.

In a majority of states, lesbian and gay couples are able to complete adoptions (often called second parent, co-parent, or domestic partner adoptions) to formalize their parental relationships with their partners' adopted or biological children. Several states also allow same-sex couples to bring parentage proceedings to declare a legal relationship between the non-biological parent and the child before the child is born. Lesbian couples typically are bringing adoption proceedings after the child is born, especially in "relationship recognition" states where they generally will be able to get their names on their children's birth certificates and earn state recognition as parents automatically, and therefore can wait until after birth to secure a judgment that makes their parentage portable. (Where there is a reason why parentage needs to be adjudicated before the child is born, a parentage action will be the better route.) But whether by adoption or parentage action, what matters is that the couple obtains a court judgment that states unequivocally that both are parents.

Given the uncertainty of the times we live in, and given the growing chasm between the states that are protecting same-sex families and those that are not, there is no question that same-sex couples who live in states that offer them the opportunity to provide legal protections for their relationships—and, most especially, for their relationships with their children—are well-advised to do so. By bringing an adoption or parentage action, and obtaining a final judgment, they can create a legal parent-child relationship that is not dependent on their adult status as domestic partners or spouses, and avoid the heartache of litigation in a hostile jurisdiction at some later date that can prove financially and emotionally devastating for all involved.

New Online Resources for Families and Children about Divorce and Separation

We are pleased to let you know about a new resource that the AOC's Center for Families, Children & the Courts helped develop to make it easier for courts to provide information to families and children about divorce and separation: **www.familieschange.ca.gov** and **www.changeville.ca.gov**.

In addition to assisting parents with information and resources for accessing the courts and resolving parenting disputes, both sites provide developmentally appropriate information for young children and teens. Changeville is an interactive site with extensive information and opportunities to explore feelings and issues that many young people face. By providing such information, those accessing the courts may be more informed about family law related issues and in a better position to navigate court processes. Additionally, a three-hour parenting after separation course is in development and will be added to the families change site within the next few months.

To conserve resources, these sites were adapted from those developed by the Justice Education Society, a non-profit organization that supports the British Columbia justice system. The Justice Education Society and the British Columbia justice system are internationally recognized for the work they have done to educate the public about the courts.