

DO I STILL HAVE TO ADOPT MY OWN CHILDREN?

Why Lesbian and Gay Couples Must Formalize Parent-Child Relationships in Court

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NOTE: This article does not address issues for lesbian and gay couples adopting children from outside their union. Instead, it addresses the issues facing same-sex couples having children together, as couples. Changes in family law mean that many same-sex 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 five years, an increasing number of states have passed laws that provide legal protections 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 partnership or civil union – in most of these states any children born into the legally-recognized unions are treated as the children of both members of the couple. 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 families, and is cause for celebration.

But, as with so many such things, there's a catch – or maybe two catches.

First, the federal Defense of Marriage Act (DOMA), 28 USC 1738C, says: "No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship." To the extent that a claim of parentage "arises from" a same-sex domestic partnership, civil union, or marriage, it is almost certain that the federal government and hostile states will disregard the claim under either the federal DOMA or their own state DOMA or both.

Second, 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. Therefore, in order to make parental status portable from state to state, lesbian and gay parents must make certain they have court judgments saying they are parents. We have a graphic example in our national community of why these 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.

Even more worrisome is the prospect of the federal government refusing to recognize parentage based on same-sex marriages, civil unions, or domestic partnerships even when there is no conflict between the parents. Picture this: your same-sex spouse – who is the non-biological mother of your child – dies of cancer when your child is only 3 years old. Your spouse was the primary breadwinner for your family. You knew that you would not be eligible for Social Security survivor benefits because the federal government does not recognize your marital union, but you always assumed that your child would be, because you have a birth certificate showing both of you as parents. Enter the federal DOMA – and all of a sudden you could have the federal government denying Social Security benefits to your child, too, on the grounds that your deceased partner's claim of parentage "arises from" a same-sex marriage denied federal recognition by DOMA. Or imagine an IRS audit resulting in denial of your partner's claim of your child as an exemption. Or imagine the Department of Homeland Security refusing to issue your child a passport with your partner listed as a parent. You get the idea....

The bottom line is that lesbian and gay parents cannot rely on recognition of their adult relationships 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. Unfortunate, but that is the reality of the world we currently live in.

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. As a general rule, gay men having children through surrogacy use parentage actions to establish the legal parent-child relationship because these proceedings often can be brought before the child is born, and will adjudicate the non-parentage of the surrogate (and her husband if she has one) in the same proceeding. Lesbian couples more typically are bringing adoption proceedings after the child is born, since in "relationship recognition" states they will generally 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. But whether by adoption or parentage action, what matters is that the couple obtain a court judgment that states unequivocally that both are parents.

We are seeing a flurry of litigation where adoptions and parentage actions completed by same-sex couples in friendly states are later being attacked in hostile states. Although these cases are always alarming, so far we have courts unanimously finding in favor of the judgments. For example: In *Finstuen v. Crutcher*, the U.S. Court of Appeals for the 10th Circuit ruled that the Full Faith & Credit Clause requires states to give full recognition to same-sex adoptions from other states. This case arose when Oklahoma refused to issue new birth certificates to children born in Oklahoma but adopted by same-sex couples in states that allow same-sex adoptions. As stated by the court:

"We hold that final adoption orders by a state court of competent jurisdiction are judgments that must be given full faith and credit under the Constitution by every other state in the nation. Because the Oklahoma statute at issue categorically rejects a class of out-of-state adoption decrees, it violates the Full Faith and Credit Clause."

This decision has been echoed in the Nebraska case of *Russell v. Bridgens* ("A judgment rendered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in Nebraska as in the state rendering judgment") and again just a few weeks ago (May 13, 2009) when the Florida Court of Appeals ruled that "there are no public policy exceptions to the full faith and credit which is due to judgments entered in another state," and concluded that "regardless of whether

the trial court believed that the Washington adoption violated a clearly established public policy in Florida, it was improper for the trial court to refuse to give the Washington judgment full faith and credit.”

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.



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