Family Issues and the LGBT Community

Issues Regarding Marriage Equality:

- One of the most important things to know is that same sex marriage did not solve all of the problems for same-sex families. When people think about families that include marriage, they are rarely critical about the legal relationships between individuals that make them a family. One such place where this is critical is in parentage.
- Domestic Partnerships
  - In D.C. domestic partnership are controlled by statutory law, D.C. Code § 32–702.
- Civil Unions
  - Several states are converting or have converted their Civil Unions to marriages. Some of those states AUTOMATICALLY convert the Civil Unions to marriages unless a couple opts out, some only convert to marriages if a couple opts in. IF CLIENTS HAVE A CIVIL UNION, they should determine whether they will automatically become married when these conversions occur or if they are considered legally married now.
- Common Law Marriage
  - Jurisdictions which recognize common law marriages often require a couple to have lived together as if married for a certain amount of time, often with a requirement that the couple intended to be married in doing so. For same-sex couples, a timing issue may arise to determine whether or not they are in a common law marriage: is the “beginning” of such a marriage when they began cohabiting? When they had the intent to be married? Or is it only when same-sex marriages began to be recognized in their jurisdiction? When same-sex marriages could actually be performed in their jurisdiction? Did they need to have the present “intent” to be married again after same-sex marriage actually became legal, or was the prior “intent” sufficient? Timing issues and “length of marriage” issues such as these may impact whether a common law marriage even exists, as well as numerous other areas of family law, such as alimony and Social Security benefits.

I. The Importance of Parentage

- A parent’s “legal” status may impact their ability to make health care or other decisions for a child in an emergency, for example, or the child’s eligibility for certain benefits (such as health insurance or Social Security). If the parent is a “legal” parent, both parties acquire the concomitant inheritance and intestacy rights; additionally, 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 is not ripped away from them to live with a
relative or as a ward of the state. Without this legal status, a “non-legal” parent will be a legal stranger to their own children.
• As may be evident, if only one parent is considered the “legal” parent of the child, that parent is endowed with all of the constitutional protections of parenthood, including deciding who gets custody and/or visitation with that child; the other parent has no such protections. This becomes incredibly important if a same-sex couple splits up; one parent could, in effect, deny the other (non-“legal”) parent any access to their mutual child. Although many states now recognize same-sex marriage, even if the parties are married, the non-“legal” spouse will be considered a mere step-parent with no automatic rights as to custody or visitation. In the same vein, the non-“legal” spouse will not be liable for child support, as the children will not be considered legally theirs to support.
• Birth Certificates: In Pavan v. Smith, the Arkansas Supreme Court prohibited the Arkansas Department of Health from issuing birth certificates that list both spouses as parents when a child is born to a married same-sex couple. The Court held that it is not required to treat married same-sex couples equally to opposite-sex spouses with respect to the right to be listed as parents on their child’s birth certificate. (The Supreme Court has been asked to review this case.)

II. How to Prove Legal Parentage MaritalPresumption & Second Parent Adoption
• The Marital Presumption
  o When a child is born during a marriage, the child is presumed to be the offspring of the husband. The marital presumption is created through a state statute that often uses gender specific language, and includes a means of rebutting the presumption through biology.
  o The issues with the marital presumption:
    1. The marital presumption differs by state.
    2. The marital presumption is often statutory and the language can be gendered. In some states, courts have found that the term “husband” does not necessarily need to be thought of in a gender neutral way.
    3. The goal of the marital presumption was to ensure that all children had both a mother and a father. It was created so that men could not just make accusations about their wives infidelity and abandon all responsibility for the child. As such, there is a clause that excuses responsibility where biology proves there is no genetic connection between father and child. With same sex couples, where one parent is a birth and bio mom, and the other parent does not have a genetic connection parentage could be denied.
  o Cases illustrating the issue with the marital presumption
    i. In Jann P. v. Jamie P., NYLJ 1202664272007 (published July 23, 2014)
      • A court refused to allow same-sex couples the benefit of the marital presumption, because couples could not
biologically have had the child together. A New York court found no marital presumption applied even when a married lesbian couple had planned for and had the child during their marriage, because they were both women.

- **Second Parent Adoption**
  - Because the marital presumption differs by state, it is important to get a judgment about parentage because it is subject to full faith and credit. In *V.L. v. E.L.*, the Supreme Court held that same-sex adoptions are subject to full faith and credit. 136 S.Ct. 1017 (2016).
  - Whereas a family that relies on the marital presumption may be putting parental rights in jeopardy if they move to another state, a family with a second parent adoption is safeguarded from the diversity of laws and options regarding family. Currently there is a draft of a religious freedom executive order (page 9) circulating the white house that could have a negative impact for same-sex families.
    - Some states are passing broadly sweeping RFRAs (page 8) that allow individuals to refuse service based on religious beliefs. The religious freedom executive order that is being circulated around the White House is broadly sweeping, and could negatively affect LGBT individuals in all sectors of life. As it applies to family law it has negative implications on both marriage and adoption.
    - The order allows individuals and organizations, even if the purpose of the organization is not exclusively religious, to deny services to people or individuals who burden their religious beliefs.
    - The order allows an individual who works in social services to deny services to individuals who burden their religious beliefs. This allows specific individuals in the case of marriage (folks to give marriage certificates), and both individuals and organizations in the case of adoptions to deny services to LGBT individuals.

### III.

Where the marital presumption does not apply, and a second parent adoption has not been executed, there are different standards to establish paternity. Recently, two Maryland cases created new Maryland standards. The first case involves the establishment of de facto parentage, which is governed by statute in D.C. In the other case, the court found that consent to IVF was enough to confer the rights and responsibilities of parentage.

- **De facto Parentage**
  - De facto parent: biological or adoptive parent consented to and fostered a third party’s parent-like relationship. Lived in the same household, de facto parent took significant responsibility for care, education and development without financial reward, and lasted long enough for child and person to create a bond. Child is dependent on the person.
  - A non-“legal” parent who is not protected by the marital presumption may be able to obtain and/or retain custody of their children if anything happens to the “legal” parent or the parties split up.
In Maryland, de facto parenting is governed by the case Conover v. Conover, 146 A.3d 433 (Md. Ct. App. 2016)

- Facts: Same sex partners sought a divorce. Same sex spouse of biological mother sought custody and visitation. The Circuit Court, Washington County denied custody and visitation and granted the divorce. Same sex spouse appealed. The Court of Appeals held that de facto parenthood is a viable means for a same sex partner to establish standing to contest custody or visitation.
- An adult considered a de facto parent can have standing to consent to custody or visitation without demonstrating parental unfitness or exceptional circumstances.
- Best interest of the child reinforced

In D.C., de facto parentage is governed by statutory law. D.C. Code § 16-831.03, allows a de facto parent to file a complaint for custody of a child or to intervene in a custody action. Under D.C. Code § 16–831.01:

1) "De facto parent" means an individual:
   (A) Who:
   (i) Lived with the child in the same household at the time of the child's birth or adoption by the child's parent;
   (ii) Has taken on full and permanent responsibilities as the child's parent; and
   (iii) Has held himself or herself out as the child's parent with the agreement of the child's parent or, if there are 2 parents, both parents; or
   (B) Who:
   (i) Has lived with the child in the same household for at least 10 of the 12 months immediately preceding the filing of the complaint or motion for custody;
   (ii) Has formed a strong emotional bond with the child with the encouragement and intent of the child's parent that a parent-child relationship form between the child and the third party;
   (iii) Has taken on full and permanent responsibilities as the child's parent; and
   (iv) Has held himself or herself out as the child's parent with the agreement of the child's parent, or if there are 2 parents, both parents.

- Consent to In Vitro Fertilization
    - The Court held that paternity was established where a man, who was not fertile, consented to in vitro fertilization of his wife by accompanying her to the reproductive clinic, signing IVF consent forms, signing forms that he approved treatment, staying with his wife during the pregnancy and past childbirth, and signing the child’s birth certificate.
    - When a married woman conceives a child via artificial insemination and has consent of her husband, the child is
legitimate child of both parents. Consent is assumed unless otherwise stated.

- If “de facto” parentage and the marital presumption are not available to a same-sex partner for whatever reason, some advocates around the country have espoused theories of “parentage by estoppel.” Under this theory, same-sex couples who plan to have children together (usually through artificial insemination or surrogacy) may have changed their positions in reliance upon the legal parent’s assertion that they would be starting a family and raising a child together. This argument may be particularly effective when the non-“legal” parent has not taken any steps to acquire legal parentage because the other parent gave assurances that such was not necessary. For cases in this vein and on de facto parentage generally around the country, see the following cases and article:
  - Pickelsimmer v. Mullins, 317 S.W.3d 569 (Ky. 2010).
  - Soohoo v. Johnson, 731 N.W.2d 815 (Minn. 2007).
  - Logan v. Logan, 730 So. 2d 1124 (Miss. 1998).
  - Kulstad v. Maniaci, 352 Mont. 513 (Mt. 2009).
  - In re Bonfield, 97 Ohio St. 3d 387, 780 N.E.2d 241 (2002); In re Mullen, 129 Ohio St. 3d 417, 953
IV. Although surrogacy was previously not legal, the D.C. Council has passed the Collaborative Reproduction Law, which legalizes surrogacy and creates a framework for it to happen. DC Surrogacy Law, http://lims.dccouncil.us/Download/33209/B21-0016-Engrossment.pdf

- Individuals are not allowed to enter into surrogacy contracts- an agreement that allows an individual to gestate a child for a person or persons who are unable to gestate, and relinquish rights to the child after birth.
- Although the D.C. Council has passed the bill it is still awaiting the Mayor’s review. After the mail reviews it, it will be transmitted for Congressional Review.
- The D.C. collaborative reproduction law includes traditional surrogacy, which occurs when the woman who carries the baby also provides the egg for the baby.
- Establishes a set of standards for surrogacy:
  1. Must be a written agreement
  2. Surrogate must be at least 21, have given birth, have had a medical evaluation and been approved, mental health evaluation, and mental health evaluation with parents to be.
  3. Parents: at least 21, joint consultation with surrogate. All parties who wish to be parents must do this.
  4. Surrogacy agreements:
     a. Be in writing
     b. Executed BEFORE embryo transfer or insemination
     c. Affirmation by legal counsel of all parties that read and understand agreement.
     d. Affirmation by surrogate and partner that they are not the parent, agree to surrender physical custody, surrogate controls her body, cooperate in legal proceedings, and adhere to all parts of the statute.
     e. Affirmation by parents: accept physical custody of baby, and sole responsibility once born.
     f. Parents assume all costs for reasonable medical and ancillary expenses, additionally termination of pregnancy if it is necessary.
     g. Procedure for dispute resolution.
     h. Notarized and signed by 2 witnesses.
V. The law has also grown to include the possibility of three parents in DC.

- Three Parent Judgment of Parentage
  - Statute: D.C. Code Section 16-831.01(1)(B) defines a de facto parent as an individual who has:
    1. Lived with the child in the same household at the time of the child’s birth or adoption by the child’s parent
    2. Has taken full and permanent responsibilities as the child’s parent
    3. Has held self out as parent, or if there are 2 parents, both parents;
       OR
    1. Lived with child in same household for at least 10 of the 12 months immediately before filing for custody
    2. Had formed strong emotional bond with child, and that child’s bio parent encouraged the parent-child relationship
    3. Full and permanent responsibilities as the child’s parent; and
    4. Held self out as parent, or if 2 parents, both parents.
  - The last phrase in the definition of de facto parent authorizes three parents.
- Three parent custodial order, and a three parent Judgment of Parentage.

For additional information on any of these topics, the following organizations may be helpful:

Human Rights Campaign, www.hrc.org
The National Center for Lesbian Rights, www.nclrights.org
Lambda Legal, www.lambdalegal.org
Gay & Lesbian Advocates and Defenders (GLAD), www.glad.org
LGBT POLICY SPOTLIGHT:
STATE AND FEDERAL
RELIGIOUS EXEMPTIONS
AND THE LGBT COMMUNITY

EXECUTIVE ORDER

Establishing a Government-Wide Initiative to Respect Religious Freedom

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to guide the executive branch in formulating and implementing policies with implications for the religious freedom of persons and organizations in America, and to further compliance with the Constitution, applicable statutes, and other legal authorities, it is hereby ordered:

Section 1. Policy. The United States Constitution enshrines and protects the fundamental natural right to religious liberty. This Constitutional protection ensures that Americans and their religious organizations will not be coerced by the Federal Government into participating in activities that violate their consciences, and will remain free to express their viewpoints without suffering adverse treatment from the Federal Government. It shall be the policy of this Administration to protect religious freedom.

Sec. 2. Definitions. For purposes of this order:

(a) “Person” shall have the same definition as “person” in 1 U.S.C. 1.

(b) “Religious exercise” includes all aspects of religious observance and practice, as well as belief, and includes any act or any refusal to act that is motivated by a sincerely held religious belief, whether or not the act is required or compelled by, or central to, a system of religious belief.

(c) “Religious organization” shall be construed broadly to encompass any organization, including closely held for-profit corporations, operated for a religious purpose, even if its purpose is not exclusively religious, and is not limited to houses of worship or tax-exempt organizations, or organizations controlled by or associated with a house of worship or a convention or association of churches.

Sec. 3 Religious Freedom Principles and Policymaking Criteria. All executive branch departments and agencies (“agencies”) shall, to the greatest extent practicable and permitted by law, adhere to the following principles and criteria when formulating and implementing regulations, actions, or policies:

(a) Religious freedom is not confined to religious organizations or limited to religious exercise that takes place in houses of worship or the home. It is guaranteed to persons of all faiths and extends to all activities of life.

(b) Persons and organizations do not forfeit their religious freedom when providing social services, education, or healthcare; earning a living, seeking a job, or
employing others; receiving government grants or contracts: or otherwise participating in
the marketplace, the public square, or interfacing with Federal, State or local
governments.

(c) As required by religious freedom laws such as the Religious Freedom
Restoration Act, 42 U.S.C. 2000bb et seq. (“RFRA”) and the religious provisions of Title
VII of the Civil Rights Act of 1964, 42 U.S.C. 20003 et seq., agencies shall faithfully
discharge their duty to accommodate the religion of federal employees and shall not
promulgate regulations, take actions, or enact policies that substantially burden a person’s
or religious organization’s religious exercise unless the imposition represents the least
restrictive means of furthering a compelling governmental interest. Regulations, actions,
or policies shall not be deemed “compelling” simply by virtue of their having been
applied neutrally, broadly, or across the Federal Government.

Sec. 4. Specific agency Responsibilities to Avoid Potential Violation of Religious
Freedom

(a) The Secretaries of Health and Human Services, Labor, and Treasury shall
immediately issue an interim final rule that exempts from the preventative-care mandate
set forth in 42 U.S.C. 300gg-13(a)(4) all persons and religious organizations that object to
complying with the mandate for religious or moral reasons.

(b) The Secretary of Health and Human Services shall take appropriate actions,
through mechanisms to ensure compliance with existing statutory and other protections,
if necessary, to ensure that any individuals purchasing health insurance in the individual
market (whether through a federally facilitated exchange, a state-sponsored health
insurance exchange, or otherwise) has the ability to purchase health insurance that does
not provide coverage for abortion and does not subsidize plans that do provide such
coverage.

(c) The Secretary of Health and human Services shall take all appropriate actions
to ensure that the Federal Government shall not discriminate or take any adverse action
against a religious organization that provides federally-funded child-welfare services,
including promoting or providing adoption, foster, or family support services for
children, or similar services, on the basis that the organization declines to provide,
facilitate, or refer such services due to a conflict with the organization’s religious beliefs.
The Secretary of Health and human Services shall, where authorized by law, promptly
propose for notice and comment new regulations consistent with this policy.

(d) All agencies shall, with respect to any person, house of worship, or religious
organization that is a recipient of or offeror for a Federal Government contract,
subcontract, grant, purchase order, or cooperative agreement, provide protections and
exceptions consistent with sections 702(a) and 703(e) of the Civil Rights Act of 1964 (42
U.S.C. 20003-I(a) and 2000e-2(e)) and section 103(d) of the Americans with Disabilities
Act of 1990 (42 U.S.C. 12113(d)). The Secretary of Labor shall, where authorized by
law, promptly propose for notice and comment new regulations consistent with this policy.

(e) The Secretary of the Treasury shall ensure that the Department of the Treasury shall not impose any tax or tax penalty, delay or deny tax-exempt status, or disallow tax deductions for contributions made under 26 U.S.C. 501(c)(3), or otherwise make unavailable or deny any tax benefits to any person, church, synagogue, house of worship or other religious organization.

(1) on the basis of such person or organization speaking on moral or political issues from a religious perspective where religious speech of similar character has, consistent with law, not ordinarily been treated as an intervention in a political campaign by the Department of the Treasury, or

(2) on the basis that such person or organization believes, speaks, or acts (or declines to act) in accordance with the belief that marriage is or should be recognized as the union of one man and one woman, sexual relations are properly reserved for such a marriage, male and female and their equivalents refer to an individual’s immutable biological sex as objectively determined by anatomy, physiology, or genetics at or before birth, and that human life begins at conception and merits protection at all stages of life.

The Secretary of the Treasury and the Commissioner of Internal Revenue shall, where authorized by law, promptly propose for notice and comment new regulations consistent with this policy.

(b) No agency shall, to the extent allowed by law, not recognize any decisions or findings made by any federally-recognized accrediting body that revokes or denies accreditation to, or otherwise disadvantages, a religious organization on the basis that such organization believes, speaks, or acts (or declines to act) in accordance with a belief described in section 4(e)(2) of this order.

(g) No agency shall exclude or otherwise make unavailable or deny any person or religious organization admission or access to charitable fundraising campaigns on the basis that such person or organization believes, speaks, or acts (or declines to act) in accordance with the beliefs described in Section 4(e)(2) of this order.

(k) No agency shall take adverse action against any person or religious organization that is a Federal employee, contractor, or grantee on the basis of their speaking or acting in accordance with the beliefs described in section 4(e)(2) of this order while outside the scope of their employment, contract, or grant, and shall reasonably accommodate such speech and action when made within the course of their employment, contract, or grant. This provision shall not be construed to diminish or otherwise limit any other protection provided by this order.

(l) The Attorney General shall establish with the Department of Justice a Section or working group that will ensure that the religious freedom of persons and religious
organizations is protected throughout the United States, and shall investigate and, if necessary, take or coordinate appropriate action under applicable religious freedom laws.

Sec. 5. General Provisions.

(a) All agencies shall promptly withdraw or rescind any rulings, directives, regulations, guidance, positions, or interpretations that are inconsistent with this order to the extent of their inconsistency.

(b) The provisions of this order shall prevail in cases of conflict with any existing executive order and with any future executive order unless such future order explicitly refers to, and limited or excludes, the application of this order.

(c) Nothing in this order shall be construed to impair or otherwise affect (i) the authority granted by law to an agency, or the head thereof, or ii) the functions of the OMB Director relating to budget, administrative, or legislative proposals.

(d) This order shall be carried out subject to the availability of appropriations and to the extent permitted by law.

(e) This order does not create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its departments, agencies or instrumentalities, its officers, employees, or agents, or any other person.