

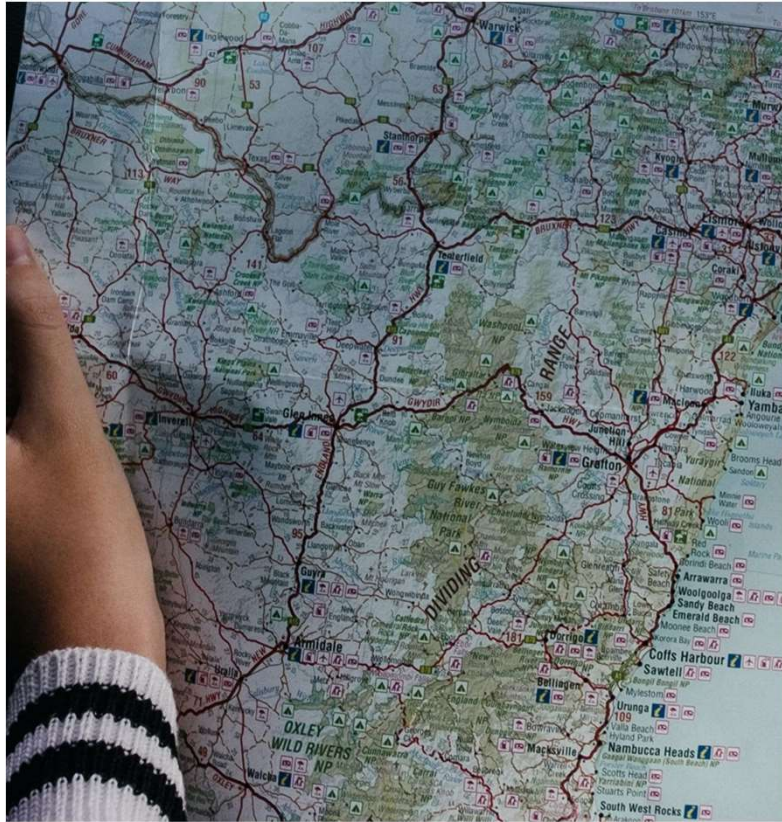


The Judicial System & LGBTQ+ Families: A Cultural Humility Approach

Prepared for:
Ohio Magistrates
Conference

Prepared by:
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Deputy Director





Roadmap for our Time

Why Cultural Humility?

LGBTQ+ Identity

Lived Experiences of LGBTQ+ Youth



Who is Equality Ohio?

Equality Ohio identifies and transforms systems and institutions so LGBTQ+ Ohioans can fully access legal and lived equality. We envision an Ohio where people are welcome, affirmed and flourishing. We do this through:

- Statehouse and Agency Advocacy
 - Municipal Policy Work
 - Legal Clinic
- Public Education Programming

We are always here as a resource! You can ask us anything in a **judgement-free space** because we are here to help you become a full supporter of LGBTQ equality.



Part 2:

Cultural Humility: How We Approach Others



Cultural Humility

A lifelong commitment to self-evaluation and self-critique, to redressing the power imbalances in the patient-physician dynamic, and to developing mutually beneficial and nonpaternalistic clinical and advocacy partnerships.



Cultural Competence	Cultural Humility
Develop an understanding based on knowledge & training	Self-reflection and introspection based on co-learning
Based in academic knowledge. Can be achieved.	Based in experiences. No end goal, always learning.
Can provide a false sense of knowledge that overpowers lived experiences.	Can balance power within relationships.

Lived Experiences

1. Personal knowledge about the world gained through direct, first-hand involvement in everyday events rather than through representations constructed by other people.
1. Our situated, immediate, activities and encounters in everyday experience, prereflexively **taken for granted as reality** rather than as something perceived or represented.





Cultural Humility & the Lived Experiences of Others

Self-Reflection

- What do I know about myself that others wouldn't know from looking at me?
- Do I have any formal or informal social disadvantages? Would others think I have them?
- What do people get wrong about me? Why?





Guiding Principle: Diversity is Natural



Variations in sexual orientation, gender identity and gender expression are part of the normal spectrum of human diversity.

www.cerespolicyresearch.com






Guiding Principle #2: Identity Doesn't Equal Risk



The increased risks faced by LGBTQ and gender nonconforming youth and adults—particularly those of color—are not inherent to their identities, but stem from the stresses of prejudice, discrimination, rejection, and mistreatment.

www.cerespolicyresearch.com





Guiding Principle #3: Science isn't Stationary



Scientific inquiry into gender and sexual orientation both in humans and the animal kingdom has been occurring for hundreds of years and continues in earnest today. We don't yet have all of the answers.



Marginalization: treatment of a person, group, or concept as insignificant or peripheral

LGBTQ people exist across TIME, AGE, GENDER, RACE, NATIONALITIES, ECONOMIC CLASS, SOCIAL CLASS, PHYSICAL BOUNDARIES, RELIGIONS, and POLITICAL IDEOLOGIES.

Each of these larger groups, at one point or another, has marginalized or is marginalizing the LGBTQ subgroup within.

Trauma: a deeply distressing or disturbing experience.

LGBTQ people across TIME, AGE, GENDER, RACE, NATIONALITIES, ECONOMIC CLASS, SOCIAL CLASS, PHYSICAL BOUNDARIES, RELIGIONS, and POLITICAL IDEOLOGIES experience trauma.

Trauma occurs in homes, schools, workplaces, public spaces and faith spaces.

Minority Stress

- The **presence** of discrimination, stigma, and prejudice creates a hostile social climate that **taxes individuals' coping resources**
- This is true **even for those who are not directly exposed to discrimination**
 - Manifestations of this stress include: internalized stigma, low self-esteem, **expectations of rejection** & fear of discrimination
 - Protective factors include: peer, community, and family support; access to affirming health care and social services, **inclusive practices**, and anti-discrimination policies.
- Research shows that exposure to anti-LGBT discrimination **increases the risks of poor mental and physical health** for all LGBT people

Part 3:

LGBTQ+ Identity & Lived Experiences



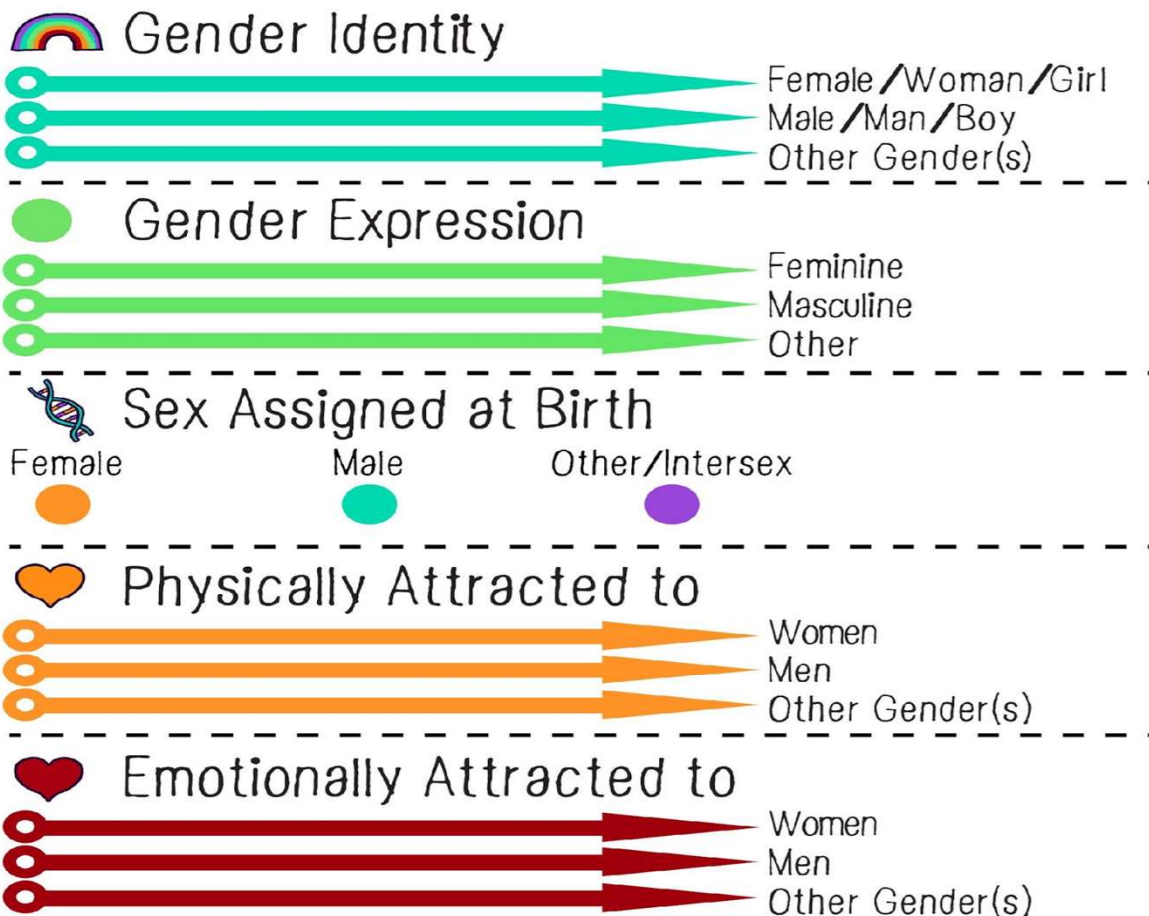
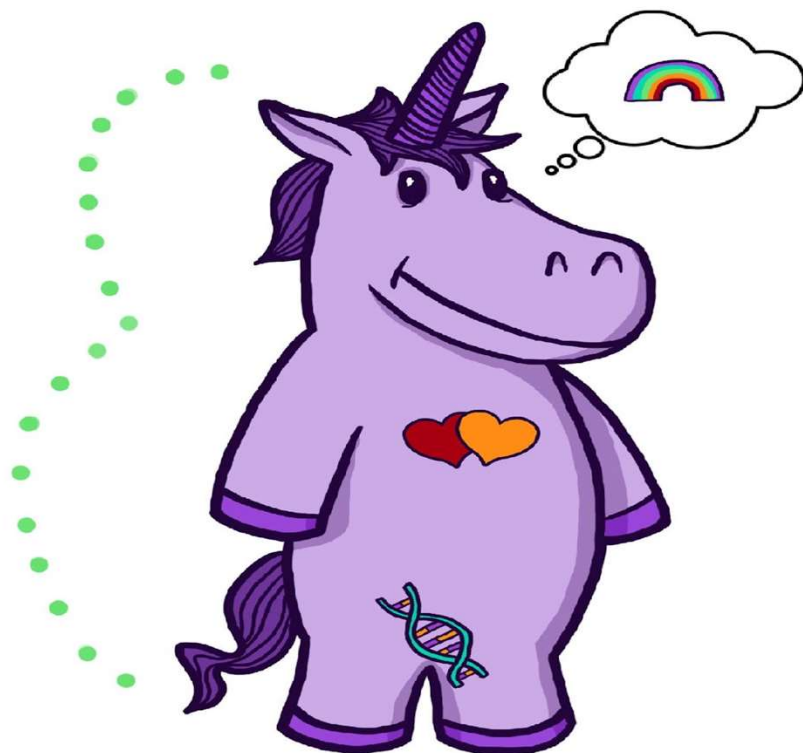
Sexual Orientation & Gender Identity (SOGIE)

- **Sexual Orientation:** An inherent or immutable enduring emotional, romantic or sexual attraction to other people.
- **Assigned Birth Gender (or Sex):** An individual's determined gender based upon genitals, reproductive organs, and/or chromosomes; what the doctor said you were when you were born.
- **Gender Identity:** One's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth.
- **Gender Expression:** External appearance of one's gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.



The Gender Unicorn

Graphic by:
TSER
Trans Student Educational Resources



To learn more, go to:
www.transstudent.org/gender

Design by Landyn Pan and Anna Moore



Sexual Orientations

- **Straight:** Having attraction to the opposite gender.
- **Lesbian:** Women who have attraction to other women.
- **Gay:** Men who have attraction to other men (women who are attracted to women sometimes use this term).
- **Bisexual/Pansexual:** Having attraction to two or more genders (such as men and women).
- **Same Gender Loving/SGL:** An Afrocentric alternative to LGB identities coined in the 90s



A special note about “Queer”

16th century: originally meant strange, peculiar or odd.

Early 20th century: began being used as a **slur** for LGBTQ folks.

Late 1980's: partial reclamation as part of the LGBTQ equality/AIDS rights movement.

Today: An umbrella term that **some** LGBTQ+ people may use to describe themselves or the community at large.

*Should **not** be used to describe any person who has not first identified themselves as Queer.*



Gender Identities

- **Cisgender:** A person whose gender identity conforms with the gender they were assigned at birth; a person who is not transgender.
- **Transgender:** A person whose gender identity differs from the gender they were assigned at birth; a person who is not cisgender.
 - **Transgender Woman (MTF):** A woman who was assumed male at birth.
 - **Transgender Man (FTM):** A man who was assumed female at birth.
 - **Genderqueer/Gender Nonconforming/Gender Non-Binary (Enby):** Umbrella terms for an individual who does not necessarily identify as male or female.
- **Intersex:** A person born with a variation in sex characteristics and cannot be distinctly assigned as male or female. It is **not** the same as transgender.



Gender Identity Development

- **Around age two:** Children become conscious of the physical differences between boys and girls.
- **Before their third birthday:** Most children can easily label themselves as either a boy or a girl.
- **By age four:** Most children have a stable sense of their gender identity.

Research suggests that children who assert a gender-diverse identity know their gender as clearly and consistently as their developmentally matched peers.

Source: [Healthychildren.org](https://www.healthychildren.org)



Transition

Steps—physical, medical, and/or social—an individual will take to align the world's understanding of their gender with who they know themselves to be.

Transitioning is a personal decision an individual makes.

Someone's transition may not be physical at all.



Remember:

- **Gender Identity** is who you are.
- **Sexual Orientation** is who you are attracted to.
- **Gender Expression** does not tell you gender identity or sexual orientation.
- **Transition** is different for every individual and it is **personal**.



LGBTQ Population In Ohio



- 462,000 people (13+) identify as LGBTQ
- 5% of Ohio's workforce is LGBTQ
- 30% of LGBTQ adults (25+) are raising children





Realities Facing LGBTQ+ Youth





Guiding Principle #2: Identity Doesn't Equal Risk



The increased risks faced by LGBTQ and gender nonconforming youth and adults—particularly those of color—are not inherent to their identities, but stem from the stresses of prejudice, discrimination, rejection, and mistreatment.

www.cerespolicyresearch.com





Discrimination

- 75% of LGBTQ youth reported that they had experienced discrimination based on their sexual orientation or gender identity at least once in their lifetime.
- Half of all LGBTQ youth of color reported discrimination based on their race/ethnicity in the past year, including 67% of Black LGBTQ youth and 60% of Asian/Pacific Islander LGBTQ youth.





Suicide & Self-Harm

- 42% of LGBTQ youth seriously considered attempting suicide in the past year, including more than half of transgender and nonbinary youth.
- 12% of white youth attempted suicide compared to 31% of Native/Indigenous youth, 21% of Black youth, 21% of multiracial youth, 18% of Latinx youth, and 12% of Asian/Pacific Islander youth.
- only 1 in 3 LGBTQ youth found their home to be LGBTQ-affirming.



Suicide & Self-Harm

Affirming transgender and nonbinary youth by respecting their pronouns and allowing them to change legal documents is associated with lower rates of attempting suicide.



Homelessness & Housing Insecurity

- LGBTQ+ youth are at 2.2x greater risk of experiencing homelessness
- 20 - 40% of all homeless youth are LGBTQ+ (but are only 7% of the greater population)
- More than 1 in 4 LGBTQ+ youth are forced to leave home when they come out/turn 18





Status Offenses & Other Justice Involvement

- Although only 5-7% of the youth population, LGBTQ+ youth make up *nearly 20%* of the population that are system involved.
- Gender nonconforming Black boys and transgender Black girls are 3.3x (230%) more likely to be arrested for status offenses and nonviolent misdemeanors that are not sustained in court.
- Gender nonconforming Black girls and transgender Black boys are 3.9x more likely (290%) to be charged with violent crimes or weapons violations.



Part 4:

Tips & Resources



Be Disruptive.

- **Disrupt your own thinking** – assumptions, stereotypes (even those that have been “right” in the past)
- Know your learning mode (reading, podcast, video) and **dive in!**
- **Recruit other disruptors** to practice loving feedback and gracious accountability.



Be a safe space.

- **Be the safe adult.** Just one affirming adult can save an LGBTQ+ kid's life.
- **Stand up to bullies.** LGBTQ+ folks, particularly youth, are watching, and they need to see allies standing up for them.
- **Stay involved.** Understand the social climate for LGBTQ+ people in your community and advocate for greater inclusion.



Equality Ohio Legal Clinic

The **Equality Ohio Legal Clinic** serves LGBTQ Ohioans through:

Emergency legal and personal advocacy
Victim compensation
Civil representation
Referrals (Lawyer Referral Network)
Holistic support, including social services referral

1-855-LGBT-LAW

equalityohio.org/legal-clinic



Questions?

We are always here as a resource!

Siobhan Boyd-Nelson (she/her)

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Ohio Association of Magistrates Fall Conference

Ethical and Professional Conduct
Considerations LGBTQ Youth and Families

September 7, 2023

Merisa K. Bowers, Esq.

Ohio Rules of Professional Conduct

Rule 1.1: Competence

Comment [5] Thoroughness & Preparation

“inquiry into and analysis of the factual and legal elements of a problem”

Comment [8] Maintaining Competence

“a lawyer should keep abreast of changes in the law and its practice ... engage in continuing study and education”



Rule 1.14: Client with Diminished Capacity

(a) “When a client’s capacity to make adequately considered decisions ... is diminished, whether because of minority ..., the lawyer shall ... maintain a normal client-lawyer relationship”



Rule 2.1: Advisor

“In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social, and political factors, that may be relevant to the client’s situation.”

Comment [2]: “Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.”

Rule 3.1: Meritorious Claims and Contentions

“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue in a proceeding, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.”



ABA Resolution 113 (Adopted 2019)

- ABA is opposed to legalized discrimination against LGBT people who are parents or desire to become parents
- *Obergefell* and *Pavan* decisions underscore the importance of equal protection and recognition of LGBT families

ABA Resolution 113



- Stability for kids
- Focus on best interests for children
- Experts overwhelmingly agree that caregivers' sexual orientation does not have bearing on children's best interests

Probate matters

In Re HCW (12th Dist. 2019)

Probate Court Judge denied name change of youth

Court of Appeals reversed and remanded

Parents and youth presented evidence that the youth was of sufficient maturity and that the name change was not against the child's interests

However, See: *In the Matter of BCA* (Decided August 21, 2023 - 11th District) regarding change of sex marker on birth certificate

Questions?
Thank you!

Merisa Bowers, Esq.
Loss Prevention Counsel
Ohio Bar Liability Insurance Company

ADOPTED

AMERICAN BAR ASSOCIATION

**NATIONAL LGBT BAR ASSOCIATION
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association opposes laws, regulations, and rules or
2 practices that discriminate against LGBT individuals in the exercise of the fundamental
3 right to parent;
4

5 FURTHER RESOLVED, That the American Bar Association urges lawmakers in
6 jurisdictions where such discriminatory laws, regulations, and practices exist to promptly
7 repeal them and ensure the equal protection of all LGBT individuals under the law; and
8

9 FURTHER RESOLVED, That the American Bar Association urges bar associations and
10 attorneys to defend victims of anti-LGBT discrimination, and to recognize and support
11 their colleagues taking on this work.

REPORT

I. Introduction

Despite significantly increased recognition of LGBT rights in recent decades, state and federal lawmakers have attempted and often succeeded in restricting LGBT individuals' fundamental right to parent. This report will describe the current state of the law regarding LGBT parenting rights, the increased threats to these rights, and all available data on the reality of LGBT parenting.

As it stands, a patchwork of current laws and judicial decisions have incorporated LGBT parents and families into areas of family law that previously only considered different-sex married couples and their families.

In its reasoning in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court acknowledged that LGBT individuals are parents to millions of children around the country and that these families deserve the same recognition and protection as any other family. However, since *Obergefell*, not every state has updated its laws to incorporate the reasoning and spirit of *Obergefell* and lawmakers in some states have incorrectly argued that there is ambiguity in the breadth of *Obergefell*'s holding that still permits discrimination against LGBT individuals. For example, ten states now permit state-licensed child welfare agencies to refuse to place and provide services to children and families if doing so conflicts with the agency's religious or moral beliefs. These policies have acutely affected LGBT parents, who are disproportionately more likely to adopt or foster children.

Any purported ambiguity supporting these policies does not exist. The Supreme Court's decision last year in *Pavan v. Smith*, 137 S. Ct. 2075 (2017), made clear that rights afforded to different-sex parents by the state cannot be denied to LGBT parents. Notably, *Pavan* extends *Obergefell* beyond marriage to require that states afford equal recognition to same-sex parents in all the same ways that they recognize different-sex parents. However, family law in each state continues to vary greatly. Some states have fully embraced the parental rights of LGBT parents, while other states are more reticent, forcing their courts to recognize rights for LGBT parents on an ad hoc basis.

Discriminatory laws restricting LGBT individuals' right to parent fly in the face of long-standing medical, psychological, sociological, and developmental research. Experts in these fields overwhelmingly agree that sexual orientation has no bearing on an individual's ability to be a fit parent. Above all, children need love, stability, and strong relationships with committed parents. LGBT parents are as capable to meet these needs as any other parents. With tens of thousands of children in foster care or awaiting adoption, restricting the number of potential loving homes on the basis of sexual orientation is arbitrary and harmful to the most vulnerable children.

II. The Current State of the Law Regarding Parenting Rights of LGBT Individuals

Over the past forty years, states have recognized that sexual orientation should no longer create a presumption against parental fitness. As a result, different levels of government have recognized that the fundamental right to parent encompasses LGBT parents, although this protection varies greatly from jurisdiction to jurisdiction.

Married Couples

Same-sex married couples enjoy the same attendant “constellation of benefits that the States have linked to marriage” that different-sex married couples enjoy. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015). As part of its reasoning, the Supreme Court reviewed family law across the country and found a “powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.” *Id.* at 2600. One of the “benefits” recognized in *Obergefell* – the fundamental right to parent – has already been reaffirmed by the Supreme Court. States are categorically prohibited from abridging parental recognition offered to different-sex married couples. See *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (“As a result, same-sex parents in Arkansas lack the same right as opposite-sex parents to be listed on a child’s birth certificate, a document often used for important transactions like making medical decisions for a child or enrolling a child in school...*Obergefell* proscribes such disparate treatment.”). However, the parentage presumption flowing from marriage (that children born to a married couple during their marriage are legally the children of the two adults) is not yet uniformly applied to same-sex couples, although some states have begun to update their statutes or interpret them in gender-neutral ways.¹

Adoption

Ten states allow second-parent adoption² either by explicit authorization in the state’s adoption statute or by appellate ruling. 1 ADOPTION LAW AND PRACTICE § 3.06. Seventeen other states have counties where trial court judges have granted second-parent adoptions. *Id.* One state’s valid final judgment of adoption regarding same-sex parents must be given full faith and credit by all other states. *V.L. v. E.L.*, 136 S. Ct. 1017 (2016). It is worth noting that family law practitioners agree that adoption remains the strongest legal connection an LGBT parent can have with their child, aside from biological relationship, because in many instances one or both parents may not be biologically related to their child.³

¹ See, e.g., UNIFORM LAW COMMISSION, UNIFORM PARENTAGE ACT OF 2017 SUMMARY (2017) <http://www.uniformlaws.org/Shared/Docs/Parentage/SummaryUPA%20final.pdf>.

² “A second parent adoption (also called a co-parent adoption) is a legal procedure that allows a same-sex parent, regardless of whether they have a legally recognized relationship to the other parent, to adopt her or his partner’s biological or adoptive child without terminating the first parent’s legal status as a parent.” NATIONAL CENTER FOR LESBIAN RIGHTS, ADOPTION BY LGBT PARENTS, http://www.ncrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf (last updated March 2018).

³ HUMAN RIGHTS CAMPAIGN FOUNDATION, SECOND PARENT ADOPTION, <https://www.hrc.org/resources/second-parent-adoption> (last accessed November 5, 2018).

Foster Parents

Prior to *Obergefell*, Arkansas's supreme court had already held that prohibitions against LGBT foster parents violated the best interest of the child standard. See, e.g., *Dep't Human Serv. & Child Welfare Agency Review Bd. v. Howard*, 238 S.W.3d 1 (Ark. 2006) (finding a promulgated rule that created a blanket exclusion of homosexuals and individuals who resided with a homosexual from becoming foster parents violated separation of powers because it did "not promote the health, safety, or welfare of foster children [required in the organic statute] but rather act[ed] to exclude a set of individuals from becoming foster parents based upon morality and bias."). In 2006, the Missouri attorney general indicated that the state must drop its "long-standing unwritten policy of not licensing homosexuals" when a plaintiff prevailed at trial after being declared unfit for a foster care license based only on their sexual orientation. COURTNEY G. JOSLIN, SHANNON P. MINTER, & CATHERINE SAKIMURA, *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* § 2:9 (2018).

Nine other states prior to *Obergefell* statutorily prohibited discrimination against sexual orientation in licensing foster parents: Massachusetts in 1990, Connecticut in 1991, Rhode Island in 1997, Nevada in 2002, District of Columbia in 2006, Oregon in 2008, California and Maryland in 2009, and Wisconsin in 2015. *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* § 2:10. New Jersey and New York prohibited discrimination against LGBT foster parents by regulation as well in 1994 and 2003, respectively. *Id.*

Additionally, since *Obergefell* Nebraska's supreme court upheld a trial court ruling that, pursuant to *Obergefell*, "the current practice of subjecting gay and lesbian individuals and couples and 'unrelated, unmarried adults residing together' to additional levels of review [for licensing or placement in foster or adoptive homes] than heterosexual individuals and heterosexual married couples" violates the Equal Protection and Due Process clauses of the Federal Constitution. *Stewart v. Heineman*, No. C113-0003157, 2015 WL 10373584 at *4 (Neb. Dist. Ct. 2015), *aff'd*, *Stewart v. Heineman*, 892 N.W.2d. 542 (Neb. 2017).

Custody

Family law's common law recognition of de facto parenthood is applicable for same-sex partners to establish standing to contest custody or visitation determinations. 1 *CHILD CUSTODY AND VISITATION* § 10.05; see also, *Conover v. Conover*, 146 A.3d 433 (Md. 2016). It violates rational basis review to prohibit same-sex parents from enjoying parental rights not limited to married couples. E.g., *D.M.T. v. T.M.H.*, 129 So. 3d 320 (Fla. 2013) (finding that an assisted reproduction statute did not limit "commissioning couple" to married individuals, so it violates rational basis review to exclude only same-sex couples as "commissioning couple.").

* * *

The policies behind these decisions consider the "best interest of the child" standard, and also safeguard a parent's Equal Protection and Due Process rights under the Fourteenth Amendment. Nonetheless, these rights are vulnerable to attack because LGBT-inclusive interpretations of the Equal Protection and Due Process clauses are not uniformly applied

by statute, common law, or appellate decision. Instead, they arise from a patchwork of local and state attempts to include LGBT families in legal categories that were originally created solely for different-sex couples.

III. Increased Threats to LGBT Parenting

Even as “our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,”⁴ state-sanctioned discrimination against LGBT individuals who wish to raise children has dramatically increased in recent years. LGBT individuals enjoy the same fundamental right to parent as non-LGBT individuals, yet state governments have chipped away at this right for the LGBT community.

A number of states now permit state-licensed child welfare agencies to refuse to place and provide services to children and families, including LGBT individuals and same-sex couples, if doing so conflicts with the agency’s religious or moral beliefs. The following ten states have enacted these laws (dates indicate when such laws were passed):

- North Dakota – April 2003
- Virginia – April 2012
- Michigan – September 2015
- Mississippi – April 2016
- South Dakota – March 2017
- Alabama – April 2017
- Texas – June 2017
- Oklahoma – May 2018
- Kansas – May 2018
- South Carolina – July 2018

Eight of the ten did so in the past three years, after *Obergefell*. Six of the eight did so after the 2016 election. Just this past spring, similar bills were considered, but ultimately rejected, in Colorado and Georgia. Child welfare agencies in other states have invoked these laws in seeking similar accommodations.⁵ Other threats to LGBT parents are likely to come in coming months and years because only eight states and the District of Columbia expressly prohibit discrimination based on sexual orientation or gender identity in adoption and foster care.⁶

⁴ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018)

⁵ For example, in March 2018, a religiously-affiliated child welfare agency sued the City of Philadelphia after the City indicated it would no longer make referrals to agencies that discriminated against LGBT parents. A federal district court denied the agency’s motion for a preliminary injunction in *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661 (E.D. Pa. July 13, 2018), but the agency appealed this decision to the Third Circuit Court of Appeals where it is pending.

⁶ Currently, these states are California, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Wisconsin.

These disturbing developments are not limited to state governments. In April 2017, the Child Welfare Provider Inclusion Act was introduced to both houses of Congress.⁷ This bill sought to prohibit the federal and state governments from discriminating or taking adverse action against child welfare agencies which refuse to provide services on the basis of their sincerely held religious beliefs or moral convictions – essentially a federal version of the growing number of similar state laws. As of November 2018, the bill has not been seriously considered by a subcommittee of either chamber. Nonetheless, in July 2018, the House Appropriations Committee approved funding for the Departments of Labor, Health and Human Services, and Education with a provision known as the “Aderholt Amendment,” which contained all the same provisions as the Child Welfare Provider Inclusion Act. Fortunately, this amendment was removed from the final appropriations bill voted on by the full House of Representatives and Senate in September 2018, but it demonstrates the extent to which all levels of government have tried to undermine the dignity and equality of LGBT families.

All these laws disregard the central consideration of family law: the best interests of children. Every child deserves a stable, loving, forever family and all child welfare decisions should be made in the best interests of the child, *not* based on the personal beliefs of a child services agency or its workers. There are approximately 440,000 children in foster care nationwide, with approximately 120,000 children waiting to be adopted.⁸ By allowing child welfare agencies to make decisions upon their personal beliefs, children remain in foster care or government group homes longer because agencies arbitrarily narrow the pool of qualified foster and adoptive homes. No one wants children to languish longer in a state’s child welfare system. Allowing an agency to discriminate against LGBT parents sends a clear message – the agency’s religious and moral beliefs are superior to their core mission of finding loving, permanent homes for children.

These discriminatory laws disproportionately affect LGBT families because LGBT individuals are significantly more likely to be raising adopted or foster children.⁹ According to recent research, one in five same-sex couples (21.4%) are raising adopted children compared to just 3% of different-sex couples, and 2.9% of same-sex couples have foster

⁷ Child Welfare Provider Inclusion Act of 2017, H.R. 1881, S.811, 115th Cong. (2017).

⁸ U.S. DEP’T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILD. AND FAMS., CHILDREN’S BUREAU, *The AFCARS Report* (Oct. 20, 2017), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf>.

⁹ Not only are LGBT people more likely to raise adopted or foster children, but many state-licensed agencies that engage in adoptive and foster care placement are religious organizations. This only amplifies the discriminatory effects of these laws because these religious organizations either have no restrictions on to whom they can deny services or are only specifically forbidden from considering historically protected categories such as race, ethnicity, or national origin when providing services. See, e.g., TEX. HUM. RES. CODE ANN. § 45.009(f) (prohibiting agencies from considering race, ethnicity, or national origin); S.D. CODIFIED LAWS § 26-6-42 (same). Given the lack of affirmative non-discrimination laws in many states, these state-licensed religious organizations could single out LGBT people for discrimination.

children compared to 0.4% of different-sex couples.¹⁰ This data reveals that LGBT parents are approximately seven times more likely to be raising adopted or foster children. An estimated 2 million LGBT adults are interested in adoption.¹¹ Even more prospective adoptive parents likely exist now after nationwide marriage equality because same-sex couples who are married or consider themselves married are more than twice as likely to raise children as same-sex couples who are not married.¹²

The recent increase in discriminatory laws aimed at limiting the rights of LGBT parents shows no sign of slowing down unless legal organizations push for the repeal of such laws and for the passage of affirmative protections for LGBT parents. Without such action, LGBT parents will continue to face de facto and de jure discrimination, harming children in foster care and children awaiting adoption.

IV. Research and Expert Opinions on LGBT Parenting

In light of all available data regarding the competency of LGBT parents and the needs of vulnerable children, the recent threats to the rights of LGBT parents defy logic, equity, and compassion. Virtually every organization that works with children recognizes the fitness of LGBT parents and opposes restrictions against their ability to raise, foster, and adopt children. The best interests of children obligate governments to increase the number of safe and supportive homes available for placement. LGBT parents foster and adopt at a much higher rate than the general population and can provide these loving homes.

Several decades of research have proven that same-sex and different-sex parents make equally good parents. In every measure of childhood development, children of same-sex and different-sex parents fare equally well.¹³ The sexual orientation of parents does not impact the emotional, cognitive, social, or behavioral development of children.¹⁴

¹⁰ PRESS RELEASE, SHOSHANA GOLDBERG & KERITH CONRON, WILLIAMS INSTITUTE, HOW MANY SAME-SEX COUPLES IN THE U.S. ARE RAISING CHILDREN? (2018), <https://williamsinstitute.law.ucla.edu/press/press-releases/same-sex-parenting/>.

¹¹ GARY GATES ET AL., WILLIAMS INSTITUTE, ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES (2007), <https://williamsinstitute.law.ucla.edu/research/parenting/adoption-and-foster-care-by-gay-and-lesbian-parents-in-the-united-states/>.

¹² CATHRYN OAKLEY, HUMAN RIGHTS CAMPAIGN FOUNDATION, DISREGARDING THE BEST INTEREST OF THE CHILD: LICENSES TO DISCRIMINATE IN CHILD WELFARE SERVICES (2017), <https://www.hrc.org/blog/hrcf-report-details-harms-of-writing-anti-lgbtq-discrimination-in-child-wel>. As of June 2017, approximately 10.2% of LGBT adults are now married to a same-sex spouse, which is up from approximately 7.9% prior to *Obergefell*. Jeffrey Jones, *In U.S., 10.2% of LGBT Adults Now Married to Same-Sex Spouse*, GALLUP (2017), https://news.gallup.com/poll/212702/lgbt-adults-married-sex-spouse.aspx?utm_source=alert&utm_medium=email&utm_content=morelink&utm_campaign=syndication

¹³ Abbie E. Goldberg, Nanette K. Gartrell & Gary Gates, Research on LGBT-Parent Families, THE WILLIAMS INST., UCLA SCH. OF L. (July 2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/lgb-parent-families-july-2014.pdf>.

¹⁴ Ellen C. Perrin & Benjamin S. Siegel, *Technical Report: Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian*, 131 *Pediatrics* e1374 (April 2013), <http://pediatrics.aappublications.org/content/pediatrics/131/4/e1374.full.pdf>; Rachel H. Farr et al., Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?, 14 *APPLIED DEVELOPMENTAL SCI.* 164, 175 (2010), <https://williamsinstitute.law.ucla.edu/wp->

Additionally, same-sex couples and different-sex couples display no differences when it comes to parenting skills, attitudes, or emotional health.¹⁵ Current research indicates that factors such as the quality of the child's relationship with parents, the quality of the relationship between parents, and the availability of economic and socio-economic resources are far more important to a child's development than his or her parent's sexual orientation.¹⁶ Thus, "the optimal development for children is not based on the sexual orientation of the parents, but on stable attachments to committed and nurturing adults."¹⁷ LGBT parents are as fit as any others to meet the needs of their children and to provide them with these stable attachments in a nurturing home environment. In short, the children of LGBT individuals "grow up as happy, healthy, and well-adjusted as the children of heterosexual parents."¹⁸

Limiting the ability of LGBT parents to foster and adopt hurts families in a multitude of ways. It deprives foster children of a safe and stable environment to grow. It deprives those awaiting adoption of the strong familial relationship to which they are entitled, and from which they could reap innumerable economic and social benefits including social security benefits, workers' compensation, health insurance, and child support – all made possible by a formal adoption relationship.¹⁹ Even more importantly, a permanent family, regardless of the parents' sexual orientation, can provide them with the love, support, stability, strong relationships, and role models that experts have concluded are crucial to raising well-adjusted and healthy children. These qualities affect a child's development far more than their parents' sexual orientation.

The data is so clear that a number of professional associations and child advocacy organizations have made statements supporting the competency of LGBT parents and have called for their equal consideration in foster care and adoption placements. The list of organizations that have made statements supporting the capability of LGBT parents includes:

content/uploads/Patterson-Farr-Forssell-AppliedDevScience-Jul-2010.pdf; Nanette Gartrell & Henny Bos, US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents, 126 PEDIATRICS 1, 7 (July 2010), <http://pediatrics.aappublications.org/content/126/1/28>.

¹⁵ Judith Stacey and Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159 (Apr. 2001), <https://www.jstor.org/stable/2657413>; Abbie E. Goldberg & JuliAnna Z. Smith, *Predictors of Parenting Stress in Lesbian, Gay, and Heterosexual Adoptive Parents During Early Parenthood*, 28 J. FAM. PSYCHOL. 125 (Apr. 2014), <http://dx.doi.org/10.1037/a0036007>.

¹⁶ Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment*, 16 APPL. DEV. SCI. 98 (Apr. 23, 2012).

¹⁷ APA, Press Release, *Adoption and Co-Parenting of Children by Same-Sex Couples*, Release No. 02-46 (Dec. 13, 2002), <http://www.ncrlrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

¹⁸ ACLU, *Overview of Lesbian and Gay Parenting, Adoption, and Foster Care*, <https://www.aclu.org/fact-sheet/overview-lesbian-and-gay-parenting-adoption-and-foster-care> (last visited Oct. 29, 2018).

¹⁹ Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 Wash. U. L. Rev. 1589, 1603—08 (2013). Available at: http://openscholarship.wustl.edu/law_lawreview/vol90/iss6/2; American Academy of Pediatrics, Committee on Psychosocial Aspects of Child and Family Health, *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339 (2002).

- the American Academy of Child and Adolescent Psychiatry (AACAP);²⁰
- the American Academy of Family Physicians (AAFP);²¹
- the American Academy of Pediatrics (AAP);²²
- the American Medical Association (AMA);²³
- the American Psychiatric Association (APA);²⁴
- the American Psychoanalytic Association (APsaA);²⁵
- the American Psychological Association (APA);²⁶
- the Child Welfare League of America (CWLA);²⁷
- the Evan B. Donaldson Adoption Institute (DAI);²⁸
- the National Adoption Center (NAC);²⁹
- the National Association of Social Workers (NASW);³⁰
- the National Foster Parent Association (NFPA);³¹ and

²⁰ AACAP, Policy Statement, *Gay, Lesbian, Bisexual, or Transgender Parents* (revised and approved by Council 2009), https://www.aacap.org/AACAP/Policy_Statements/2008/Gay_Lesbian_Bisexual_or_Transgender_Parents.aspx.

²¹ AAFP, *Children's Health* (2002) (2007), <http://www.nclrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

²² Perrin & Siegel, *supra* note 13.

²³ AMA House of Delegates, Resolution 204, A-04 (2004), <http://www.nclrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

²⁴ APA Press Release, *supra* note 16; Position Statement, *Adoption and Co-parenting of Children by Same-sex Couples* (approved November 2002), <http://www.nclrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>; APA, Resource Document, *Controversies in Child Custody: Gay and Lesbian Parenting; Transracial Adoptions; Joint versus Sole Custody; and Custody Gender Issues*, (approved Dec. 1997), <http://www.nclrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

²⁵ APsaA, *Position Statement, Gay and Lesbian Parenting* (adopted May 16, 2002), <http://www.nclrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

²⁶ APA, *Resolution on Sexual Orientation, Parents, and Children* (adopted July 2004), Sexual Orientation, Parents, and Children.

²⁷ CWLA, *Position Statement on Parenting of Children by Lesbian, Gay, Bisexual, and Transgender Adults* (April 2015), <https://www.cwla.org/wp-content/uploads/2016/01/PositionStatementOnParentingOfChildrenbyLGBT.pdf>.

²⁸ Evan B. Donaldson Adoption Institute, *Expanding Resources for Children: Is Adoption by Gays and Lesbians Part of the Answer for Boys and Girls Who Need Homes?* (Mar. 2006), https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2006_Expanding_Resources_for_Children-March_.pdf; Evan B. Donaldson Adoption Institute, *Expanding Resources For Waiting Children II: Eliminating Legal And Practice Barriers To Gay And Lesbian Adoption From Foster Care* (Sep. 2008), https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2008_09_Expanding_Resources_Legal.pdf;

²⁹ NAC, *Adoptive Parent Assessment* (approved Sep. 17, 1998), <http://www.nclrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

³⁰ NASW, Policy Statement, *Lesbian, Gay and Bisexual Issues* (2005), <http://www.nclrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

³¹ NFPA, *121.07 Fair & Equal Consideration of Foster & Adoptive Parents* (adopted May 2007), <http://www.nclrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

- the North American Council on Adoptable Children (NACAC).³²

As the Evan B. Donaldson Adoption Institute stated, “[i]t is through a commitment to expanding adoptive family resources that we can achieve the outcomes that are federally mandated for each child in foster care: safety, well-being, and a permanent family.”³³ To pursue the best interests of children at a societal level, “children should not be deprived of the opportunity for temporary foster care or adoption by single parents or couples, regardless of their sexual orientation.”³⁴ The Supreme Court itself noted in *Obergefell*, “[m]ost States have allowed gays and lesbians to adopt...and many adopted and foster children have same-sex parents,” which the Court declared to be a “powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.” 135 S. Ct. 2584, 2600.

Discriminatory barriers to fostering and adoption are particularly disturbing in light of the ever-growing number of children in the United States in need of foster homes or adoption. In 2016,³⁵ over 687,000 children entered foster care,³⁶ and on any given day, nearly 440,000 children resided in foster care.³⁷ Children remain in foster care for an average of two years.³⁸ Each year, more than 23,000 children age out of the foster care system without ever having an opportunity to be placed with a permanent family.³⁹ Children who age out of foster care face particularly daunting prospects. For example, only 6% ever attend an institution of higher learning, even though 70% of children in foster care say they would like to attend college.⁴⁰

LGBT families can provide supportive, stable homes for these children. As noted above, same-sex couples foster children at over seven times the rate of different-sex couples.⁴¹ Similarly, 21.4% of same-sex couples raise adopted children, compared to 3% of different-sex couples.⁴² Out of an estimated 705,000 same-sex couples in the U.S., about

³² NACAC, Gay and Lesbian Adoptions and Foster Care (passed April 9, 2005), <http://www.nclrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

³³ Evan B. Donaldson Adoption Institute, 2008 Statement, *supra* note 27.

³⁴ Perrin & Siegel, *supra* note 2, at e1381.

³⁵ This is the most recent year with data available.

³⁶ U.S. DEP’T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILD. AND FAMS., CHILDREN’S BUREAU, *Trends in Foster Care and Adoption*, <https://www.acf.hhs.gov/cb/resource/trends-in-foster-care-and-adoption> (last visited Nov. 1, 2018).

³⁷ U.S. DEP’T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILD. AND FAMS., CHILDREN’S BUREAU, *The AFCARS Report* (Oct. 20, 2017), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf>.

³⁸ U.S. DEP’T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILD. AND FAMS., CHILDREN’S BUREAU, *The AFCARS Report* (Oct. 20, 2017), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf>.

³⁹ National Foster Youth Institute, *51 Useful Aging Out of Foster Care Statistics | Social Race Media* (May 26, 2017), <https://www.nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media>.

⁴⁰ National Foster Youth Institute, *51 Useful Aging Out of Foster Care Statistics | Social Race Media* (May 26, 2017), <https://www.nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media>.

⁴¹ Press Release, Williams Institute, Same-Sex Parenting in the U.S. (July 31, 2018), <https://williamsinstitute.law.ucla.edu/press/press-releases/same-sex-parenting>.

⁴² Press Release, Williams Institute, Same-Sex Parenting in the U.S. (July 31, 2018), <https://williamsinstitute.law.ucla.edu/press/press-releases/same-sex-parenting>.

114,000 couples are raising children.⁴³ Among LGBT individuals under age 50 who are living alone or with a spouse or partner, nearly half of LGBT women (48%) are raising a child under age 18 and nearly a fifth of LGBT men (20%) are doing so as well.⁴⁴ These numbers could be higher if laws were non-discriminatory. In Michigan and Virginia for example, both of which have passed laws permitting child welfare agencies to discriminate against LGBT individuals, LGBT parents are raising children at a rate lower than the national average.⁴⁵ Meanwhile, thousands of children in each of these states continue to lack the stability of a permanent family while they wait for adoption.⁴⁶

Meeting the needs of these children is not only statistically compelling, but also federally mandated. Federal law establishes specific priorities for state child-welfare systems, including increasing the number of available foster and adoptive homes.⁴⁷ State and local foster-care systems cannot, therefore, arbitrarily reduce the number of potential foster and adoptive parents. Yet, laws that allow child welfare agencies to discriminate against LGBT parents do just that. This interference with the attainment of a permanent family relationship infringes upon a “child’s fundamental constitutional right to a secure and stable family relationship.”⁴⁸

In short, experts of all disciplines relating to child welfare have overwhelmingly agreed that LGBT individuals make fit parents and that an individual’s sexual orientation has no bearing on their capabilities as a parent. Additionally, shrinking children’s chances of finding a caring home simply because potential parents are LGBT causes them unnecessary harm and violates their rights. Governments must treat LGBT parents equally to safeguard their fundamental right to parent and the fundamental rights of their children to enjoy a familial relationship.

V. Conclusion

LGBT individuals possess the same fundamental right to parent as non-LGBT individuals. By supporting an LGBT-inclusive understanding of parental rights, the ABA can stand with all families to ensure that children nationwide can grow up in loving, supportive, permanent homes without unreasonable and arbitrary interference.

⁴³ <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Parenting-Among-Same-Sex-Couples.pdf>

⁴⁴ Gary Gates, *LGBT Parenting in the United States*, THE WILLIAMS INSTITUTE (2013), <https://escholarship.org/uc/item/9xs6g8xx>.

⁴⁵ Angeliki Kastanis et al., *Same-sex Couple and LGBT Demographic Data Interactive*, THE WILLIAMS INST., UCLA SCH. OF L. (May 2016), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=SS&area=42#density> (follow hyperlink, and then click on Michigan and Virginia in map).

⁴⁶ *Id.* In Michigan, about 12,000 children are in foster care at any given time, and about 3,500 await adoption. In Virginia, about 5,000 children are in foster care at any given time, and about 2,000 children await adoption. *Id.*

⁴⁷ Federal Child Welfare Law, 42 U.S.C. § 675(5)(A).

⁴⁸ Joseph S. Jackson & Lauren G. Fasig, The Parentless Child’s Right to a Permanent Family, 46 WAKE FOREST L. REV. 1, 30, 36–37 (2011).

Respectfully submitted,

Gregory Cheikhameguyaz
President, National LGBT Bar Association
January 2019

GENERAL INFORMATION FORM

Submitting Entity: National LGBT Bar Association

Submitted By: Gregory Cheikhameguyaz, President

1. Summary of Resolution.

This Resolution states the ABA's opposition to legalized discrimination against LGBT people who are or are desiring to parent children, and sets forth the ABA's call to action to legislators to repeal such laws and regulations as well as its call to bar associations and lawyers to defend against anti-LGBT discrimination.

2. Approval by Submitting Entity.

N/A

3. Has this or a similar resolution been submitted to the House or Board previously?

To the best of our knowledge and information, no similar resolution has been submitted to the House or Board previously.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

To the best of our knowledge and information, there is no existing Association policy relevant to this matter.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

6. Status of Legislation. (If applicable)

N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

Implementation requirements for the policy will be nominal, if any. The policy will be used as a guidance document for attorneys within the profession.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

None.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)
D'Arcy Kemnitz
Executive Director
National LGBT Bar Association and Foundation
1200 18th St. NW, #700
Washington, DC 20036
(202) 637-7661 (office)
darcy@lgbtbar.org
12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

The LGBT Bar Delegate is John Stephens. The substitute Delegate presenting the Resolution will be D'Arcy Kemnitz.

D'Arcy Kemnitz
Executive Director
National LGBT Bar Association and Foundation
1200 18th St. NW, #700
Washington, DC 20036
(202) 607-0732 (cell)
darcy@lgbtbar.org

EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution states the ABA's opposition to legalized discrimination against LGBT people who are parents or are desiring to be parents, and sets forth the ABA's call to action to legislators to repeal such laws and regulations as well as its call to bar associations and lawyers to defend against anti-LGBT discrimination.

2. Summary of the Issue that the Resolution Addresses

Despite significantly increased recognition of LGBT rights, in recent years, state and federal lawmakers have attempted and often succeeded in restricting LGBT individuals' fundamental right to parent. For example, ten states permit state-licensed child welfare agencies to refuse to place and provide services to children and families if doing so conflicts with the agency's religious or moral beliefs. These policies have acutely affected LGBT individuals, who are disproportionately more likely to adopt or foster children.

In its reasoning in *Obergefell v. Hodges*, the Supreme Court acknowledged that LGBT individuals are parents to millions of children around the country and that these families deserve the same recognition and protection as any other family. Going further, in *Pavan v. Smith*, the Supreme Court ruled that states are categorically prohibited from abridging parental recognition offered to different-sex married couples. Any discriminatory law which restricts an LGBT individual's right to parent not only disregards these precedents, but also contradicts longstanding research. Decades of medical, psychological, sociological, and developmental research overwhelmingly conclude that sexual orientation has no bearing on an individual's ability to be a fit parent. This Resolution therefore reaffirms the equal parenting rights of LGBT individuals.

3. Please Explain How the Proposed Policy Position Will Address the Issue

Adoption of this Resolution would ensure that the American Bar Association, representing the American legal community at large, stands with LGBT individuals and their families against the increased threat to their ability to raise children. This ABA policy position would enable further advocacy in this area by providing authority for other organizations, legislatures, and courts to consult when confronted by LGBT parenting issues. The policy would also allow the ABA to directly advocate on behalf of LGBT families and make clear its stance that laws which permit discrimination against LGBT individuals are unconstitutional.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

To date, none have been identified.

RECOMMENDED PRACTICE GUIDELINES

To Promote the Safety and Well-Being of Lesbian, Gay,
Bisexual, Transgender and Questioning (LGBTQ) Youth and
Youth at Risk of or Living with HIV in Child Welfare Settings



Contents

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8	Recommended Practice Guidelines to Promote the Safety and Well-Being of LGBTQ Youth and Youth at Risk of or Living with HIV in Child Welfare Settings
17	Conclusion



Purpose

Through these Recommended Practice Guidelines, Lambda Legal Defense and Education Fund (Lambda Legal)¹ and the Child Welfare League of America (CWLA)² seek to provide guidance to the Administration on Children, Youth and Families (ACYF), state and local child welfare agencies and their contract providers on how to fulfill their professional and legal obligations to ensure safe and proper care consistent with the best interest and special needs of each and every lesbian, gay, bisexual, transgender or questioning (LGBTQ) child in the child welfare system.³ On April 6, 2011, the

ACYF Commissioner, Bryan Samuels, issued a memorandum encouraging protection and support of LGBTQ youth in foster care.⁴ These Recommended Practice Guidelines elaborate on the provision of services to LGBTQ youth in the areas of foster care, child protection, family preservation, adoption and youth development. They aim to assist state child welfare agencies to meet the needs of this particularly vulnerable and underserved population by promoting safe, competent and supportive settings for LGBTQ youth.

1 Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those living with HIV through impact litigation, education and public policy work.

2 Established in 1920, and headquartered in Washington, DC, CWLA strives to advance sound public policy on behalf of the more than 3 million abused, neglected and vulnerable children served by its nearly 560 member agencies. CWLA's mission is to engage people everywhere in promoting the well-being of all children, youth, and their families, and protecting every child from harm.

3 The federally mandated State Plan for Foster Care and Adoption Assistance

requires that there be a case plan for each child placed in the child welfare system. The plan must be designed such that "the child's health and safety shall be the paramount concern[.]" 42 USC § 671(a)(15)(A)(2011); *see also* § 671(a)(22) (2011). The plan must include "a discussion of the safety and appropriateness of the placement[.]" 42 USC § 675(1)(A)(2011), and "address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan." § 675(1)(B)(2011). Additionally, a procedure must be in place for review of the case plan on a regular basis, to ensure that the plan remains "consistent with the best interest and special needs of the child[.]" § 675(5)(A)(2011).

4 U.S. Dep't of Health & Human Servs., Admin. on Children, Youth & Families, Information Memorandum ACYF-CB-IM-11-03, *Lesbian, Gay, Bisexual, Transgender and Questioning Youth in Foster Care* (Apr. 6, 2011).

LGBTQ Youth Are Often Underserved and Unsafe in Child Welfare Systems

LGBTQ youth are over-represented in child welfare systems across the country.⁵ For some LGBTQ adolescents in care, their sexual orientation or gender identity and/or expression is the reason they may be living out of the home. Families hostile to their children's LGBTQ identities may have rejected, abused or neglected them, causing them to enter the child welfare system in the first place.⁶ Case workers may believe that young LGBTQ people in the system are harder to place in permanent settings or reunify with families, which results in many LGBTQ youth emancipating from care without these important lifelong connections. If given appropriate support, acceptance and access to coping strategies, young LGBTQ people demonstrate high levels of resilience and positive outcomes.⁷ Conversely, if LGBTQ youth in the child welfare system are given little or no support by caregivers and child welfare professionals, they face poor prospects of successfully transitioning to adult living and face elevated health and behavioral risks compared to their non-LGBTQ peers.⁸ Research demonstrates that LGBTQ youth have higher rates of substance abuse, sexually transmitted infections and HIV infection,⁹ running away and

suicidal ideation and behavior¹⁰ because of the social stigma and harassment they face from their peers and adults in their lives.¹¹ LGBTQ youth who experience the highest levels of rejection, harassment and stigma are most at risk.¹²

LGBTQ youth in the child welfare system all too commonly face harassment and physical, verbal and sexual abuse from peers, child welfare staff and foster parents. They may be subjected to unethical and harmful conversion or reparative therapies attempting to change their sexual orientation or gender identity,¹³ put in isolation from other young people in congregate care settings, or cycled through multiple foster homes when one after another unsuitable placement turns out to be a poor fit.¹⁴ Blatant hostility and verbal abuse are often an accepted aspect of institutional culture. Because of such treatment, many LGBTQ youth feel forced to hide their sexual orientation or gender identity in order to survive. Others, unable to hide, may run away from their placements and end up on the streets.¹⁵

5 See *id.* See also Child Welfare League of Am. et al., *CWLA Best Practice Guidelines for Serving LGBT Youth in Out-of-Home Care* 1 (2006) [hereinafter *CWLA Best Practice Guidelines*]; Child Welfare League of Am. & Lambda Legal Def. & Educ. Fund, *Getting Down to Basics: Tools to Support LGBT Youth in Care* (2010) [hereinafter *Getting Down to Basics*], LGBTQ Youth Risk Data.

6 See *Getting Down to Basics*, *supra* note 5, LGBTQ Youth Risk Data.

7 See Nat'l Gay & Lesbian Task Force Policy Inst. & Nat'l Coal. for the Homeless, *Lesbian, Gay, Bisexual and Transgender Youth: An Epidemic of Homelessness* 84-85 (2006) (crediting "programs established to work specifically with LGBT homeless youth" with helping clients "feel good about [their] emerging identit[ies]" and saving clients' lives, "getting [them] off drugs, into safe housing and reconnected with [their] famil[ies]") [hereinafter *LGBT Youth: An Epidemic of Homelessness*]; Caitlin Ryan et al., Abstract, *Family Acceptance in Adolescence and the Health of LGBT Young Adults*, 23 J. Child Adolescent Psychiatric Nursing 205, 205 (2010) ("Family acceptance predicts greater self-esteem, social support, and general health status; it also protects against depression, substance abuse, and suicidal ideation and behaviors.").

8 See *LGBT Youth: An Epidemic of Homelessness*, *supra* note 7, at 41-82.

9 Ctrs. for Disease Control & Prevention, *Sexual Identity, Sex of Sexual Contacts, and Health-Risk Behaviors Among Students in Grades 9-12 – Youth Risk Behavior Surveillance, Selected Sites, United States 2001-2009*, 60 MMWR Early Release (June 6, 2011); Caitlin Ryan et al., Abstract, *Family Rejection as a Predictor of*

Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults, 123 Pediatrics 346 (2009).

10 See *LGBT Youth: An Epidemic of Homelessness*, *supra* note 7, at 41-46.

11 See Child Welfare League of Am. & Lambda Legal Def. & Educ. Fund, *Out of the Margins: A Report on Regional Listening Forums Highlighting the Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth in Care* 2-3 (2006) [hereinafter *Out of the Margins*].

12 Ryan et al., *supra* note 7.

13 Nat'l Ass'n of Soc. Workers, "Reparative" and "Conversion" Therapies for Lesbians and Gay Men (2000); Am. Psychological Ass'n, *Appropriate Therapeutic Responses to Sexual Orientation* (2009).

14 At listening forums for LGBTQ youth in out-of-home care, one teenager shared a story of being beaten by other residents and then told by group home staff that it was his own fault for being a "faggot." Another youth told of a foster family that took away her clothes and called her a "dyke." *Out of the Margins*, *supra* note 11, 18-19.

15 *LGBT Youth: An Epidemic of Homelessness*, *supra* note 7, at 11-23.



Transgender youth, whose circumstances and needs are particularly misunderstood, often suffer especially poor treatment in child welfare systems.¹⁶ They are regularly targeted for harassment and assault, denied necessary medical treatment for Gender Identity Disorder (GID), given sex-segregated

rooming assignments inconsistent with their gender identities, called by their names assigned at birth rather than their preferred names and forced to dress in ways that allow no room for their gender expression.¹⁷

¹⁶ *Getting Down to Basics*, *supra* note 5, Working with Transgender Youth.

¹⁷ See *id.*; Jody Marksamer et al., *A Place of Respect: A Guide for Group Care Facilities Serving Transgender and Gender Nonconforming Youth* (Spring 2011) [hereinafter *A Place of Respect*].

Leading Child Welfare Professional Organizations Call for Supporting LGBTQ Youth in Care

The overwhelming consensus among the country's leading and most respected child welfare, social science and medical health organizations is that LGBTQ youth and adults deserve respect and support from professional service providers. The National Association of Social Workers (NASW), the American Psychological Association (APA), the American Academy of Pediatrics (AAP) and the American Academy of Child and Adolescent Psychiatry (AACAP) vehemently oppose discrimination against LGBTQ youth.¹⁸ These professional organizations agree that all youth should be afforded the same treatment and respect regardless of sexual orientation or gender identity,¹⁹ and that discrimination causes immense social, psychological and physical harm to LGBTQ youth.²⁰

Specifically, the APA has spoken out against harmful attempts to change a child's sexual orientation or gender identity through so-called conversion or reparative therapies. Rather than benefitting youth, these "therapies" send youth the harmful message that their very identity is repulsive and deviant.²¹ The APA encourages parents, families and young people to embrace

a young person's LGBTQ identity and to seek out accurate information and social support.²²

Consistent with the professional standards governing this field, LGBTQ youth should receive culturally competent child welfare services, including: positive youth development programs; LGBTQ-affirming preventive services; foster care services focused on permanency; safe foster placements where an LGBTQ youth's sexual orientation, gender identity and gender expression are respected; referrals to LGBTQ-competent physical and mental health care providers; LGBTQ-affirming mentors and role models who can provide long-term sources of support in their lives; and transitional services that help establish independent life skills, taking into account the specific challenges faced by LGBTQ people because of pervasive discrimination.²³ By implementing these Recommended Practice Guidelines, state child welfare agencies will help remedy neglect suffered by LGBTQ youth, as well as prevent abuse and improve outcomes for these vulnerable young people, consistent with professionally accepted standards of care.

18 *Getting Down to Basics*, *supra* note 5, What the Experts Say: Position & Policy Statements on LGBTQ Issues from Leading Professional Associations.

19 "NASW recognizes that there is considerable diversity in gender expression and identity among our population and believes that people of diverse gender — including those sometimes called 'transgender' — should be afforded the same respect and rights as any other person[.]" Nat'l Ass'n of Soc. Workers, Abstract, *Transgender and Gender Identity Issues, Social Work Speaks* (2009) [hereinafter *NASW Transgender*]. NASW also states "that same-gender sexual orientation should be afforded the same respect and rights as other-gender sexual orientation." Nat'l Ass'n of Soc. Workers, Abstract, *Lesbian, Gay and Bisexual Issues, Social Work Speaks* (2009).

20 "Discrimination and prejudice toward anyone are socially, emotionally, physically, and economically damaging." See *NASW Transgender*, *supra* note 19.

21 See generally Am. Psychological Ass'n, Abstract, *Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*, [hereinafter *Appropriate Affirmative Responses*]; Am. Psychoanalytic Ass'n, *Position Statement on Reparative Therapy* (1999) ("Psychoanalytic technique does not encompass purposeful efforts to 'convert' or 'repair' an individual's sexual orientation. Such directed efforts are against fundamental principles of

psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized homophobic attitudes."); Am. Psychiatric Ass'n, *Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)* (2011) ("APA recommends that ethical practitioners refrain from attempts to change individuals' sexual orientation[.]").

22 *Appropriate Affirmative Responses*, *supra* note 21.

23 *CWLA Best Practice Guidelines*, *supra* note 5.



"LGBTQ youth and adults deserve respect and support from professional service providers."

The Historical Development of Standards of Care for LGBTQ Youth in Child Welfare Systems

In the 1990s, Lambda Legal began a national initiative to focus on the needs of LGBTQ youth experiencing discrimination in foster care and juvenile justice systems. In 2001, Lambda Legal published *Youth in the Margins: A Report on the Unmet Needs of Lesbian, Gay, Bisexual and Transgender Adolescents in Foster Care*.²⁴ The report surveyed policies and practices in 14 states and found that LGBTQ youth were neglected and marginalized by the state child welfare systems charged with safeguarding them. While many child welfare professionals recognized and endeavored to address the plight of these young people, they lacked best practice guidelines, training and resources to provide competent services to the LGBTQ young people in their care. Many of these gaps have been filled in the ensuing years with the following resources.

In 2002, Legal Services for Children and the National Center for Lesbian Rights (NCLR) launched the Model Standards Project to develop and disseminate model professional standards governing services to LGBTQ youth in out-of-home care. The Model Standards Project, in partnership with CWLA, published a resource entitled *Best Practice Guidelines: Serving LGBT Youth in Out-of-Home Care (CWLA Best Practice Guidelines)* in 2006, the first set of comprehensive professional guidelines for how child welfare and juvenile justice professionals can best serve LGBTQ youth in state care. The *CWLA Best Practice Guidelines* include accurate, up-to-date information about the best practices for supporting positive youth development; meeting the health and educational needs of LGBTQ youth; managing confidential information; and creating safe, respectful and nurturing home and social environments for LGBTQ youth in care.²⁵

In 2002, social work experts Caitlin Ryan and Rafael Díaz developed the Family Acceptance Project, a community research, intervention, education and policy initiative to

decrease major health and related risks for LGBTQ youth, such as suicide, substance abuse, HIV and homelessness by emphasizing the need for familial support.²⁶ The Family Acceptance Project has delivered the first major serial studies of parents' and caregivers' reactions and adjustment to adolescents' coming out processes and LGBTQ identities, and is advancing a family-related intervention approach to help families increase support and promote the well-being of their LGBTQ children. The Family Acceptance Project's intervention model uses a behavioral approach to help ethnically and religiously diverse families reduce their LGBTQ children's risk of suicide, depression, substance abuse, HIV, homelessness and placement in custodial care, while respecting each family's individual values. This work is being conducted in English, Spanish and Chinese with families from all ethnic backgrounds, including immigrant and very low income families, and those whose children are in foster care and juvenile justice facilities.

In 2006, CWLA, with partner organization Lambda Legal, released *Out of the Margins: A Report on Regional Listening Forums Highlighting the Experiences of Lesbian, Gay, Bisexual, Transgender and Questioning Youth in Care*.²⁷ This report summarized the findings of listening forums held around the nation, attended by representatives from state and private child welfare agencies, mental health experts, lawyers and judges, and LGBTQ youth in care, on the experiences of LGBTQ youth and gaps they experienced in care and services. That same year, CWLA and Lambda Legal also released *Getting Down to Basics: Tools to Support LGBTQ Youth in Care*,²⁸ a toolkit that offers practical information and resources for youth in care, foster and adoptive parents, professionals and agencies in child welfare and juvenile justice systems.

In 2008, the American Bar Association Center on Children and the Law (ABA CCL) published *Opening Doors for LGBTQ Youth in Foster Care*, intended to provide the legal and child

²⁴ Lambda Legal Def. & Educ. Fund, *Youth in the Margins: A Report on the Unmet Needs of Lesbian, Gay, Bisexual, and Transgender Youth in Foster Care* (2001).

²⁵ CWLA *Best Practice Guidelines*, *supra* note 5.

²⁶ The Family Acceptance Project, <http://familyproject.sfsu.edu/> (last updated Aug. 18, 2009).

²⁷ *Out of the Margins*, *supra* note 11.

²⁸ *Getting Down to Basics*, *supra* note 5.

welfare community with tools, resources and support for improving outcomes for LGBTQ youth in foster care.²⁹ In 2010, ABA CCL published *It's Your Life*, a guide for designed to help LGBTQ youth understand what to expect in the child welfare legal system.³⁰

NASW and Lambda Legal partnered in 2009 to create *Moving the Margins: Training Curriculum for Child Welfare Services with LGBTQ Youth in Out-of-Home Care*.³¹ This train-the-trainer manual leads participants through a series of learning labs, discussion sessions and role-playing activities to help them better understand the challenges faced by LGBTQ youth in out-of-home care systems and to learn strategies to provide services to this population.

In 2010, CWLA also released a new, revised edition of *LGBTQ Youth Issues: A Practical Guide for Youth Workers*, bringing recent research and clinical practice regarding LGBTQ youth into focus for all kinds of youth-serving professionals. This book, by Gary Mallon, provides a combination of practical tips, proven research and personal vignettes (where the youth are able to speak for themselves) to guide workers who want to help LGBTQ youth confront challenges with their families, at school, in out-of-home care or in the wider community. New in this edition is a chapter on transgender youth issues, a chapter on other special populations of LGBTQ youth and specially highlighted sections in each chapter that answer the question, "What Can Youth Workers Do?"

Most recently, in 2011, the Sylvia Rivera Law Project and NCLR created *A Place of Respect: A Guide for Group Care Facilities and Gender Non-Conforming Youth*.³² This compilation provides comprehensive guidance and model policies for the treatment of transgender and gender non-conforming youth in detention centers, correctional facilities, group homes and other group care facilities.

Additionally, the U.S. Department of Health and Human Services, through the Children's Bureau of the Administration for Children and Families (ACF), established several Training and Technical Assistance Networks (T&TA Networks) to

provide assistance to states and tribes in improving child welfare systems.³³ These T&TA Networks also work to ensure the safety, permanency and well-being of children and families by offering training, technical assistance, research and consultation.

The National Resource Center for Permanency and Family Connections (NRCPPFC) offers onsite technical assistance and in-depth information services in collaboration with family partners to assist in the implementation of new strategies, expanding knowledge, increasing competencies and expanding commitment to family-centered practice by child welfare professionals at all levels. The NRCPPFC has incorporated LGBTQ issues into the core of its work as it strives to increase the capacity of child welfare systems to enhance child and family outcomes in this area, offering an array of resources for LGBTQ youth and those who work with them.³⁴ Child welfare systems across the country are encouraged to utilize these resources to assist in permanency achievement, placement stability and a wide range of other foster care and wellbeing issues.

A growing number of state and local agencies have adopted comprehensive policies to address appropriate delivery of services to LGBTQ youth in care.³⁵ The Recommended Practice Guidelines that follow offer a model for state and local agencies nationwide, and are based on the standards and resources developed by experts in the field.

29 Mimi Laver & Andrea Khoury, Am. Bar Ass'n. Ctr. on Children & the Law, *Opening Doors for LGBTQ Youth in Foster Care* (Claire Chiamulera ed., 2008).

30 Krishna Desai, Mimi Laver & Andrea Khoury, Am. Bar Ass'n. Ctr. on Children & the Law, *It's Your Life* (2010).

31 Diane Elze & Robin McHaelen, Nat'l Ass'n of Soc. Workers & Lambda Legal, *Moving the Margins: Training Curriculum for Child Welfare Services with LGBTQ Youth in Out-of-Home Care* (2009).

32 See *A Place of Respect*, *supra* note 17.

33 U.S. Dep't of Health & Human Servs., Admin. for Children & Families, *Training and Technical Assistance*, <http://www.acf.hhs.gov/programs/cb/ta/> (last updated July 29, 2011).

34 Nat'l Res. Ctr. for Permanency & Family Connections, *LGBTQ Issues & Child Welfare*, http://www.hunter.cuny.edu/socwork/nrcfcp/info_services/lgbtq-issues-and-child-welfare.html (last updated Aug. 24, 2011).

35 City of New Orleans, Human Servs. Dep't, Youth Study Ctr., Policy No. 12.3, *Non-Discriminatory, Developmentally-Sound Treatment of Lesbian, Gay, Bisexual and Transgender (LGBT) Youth* (2011); N.Y.C. Admin. for Children's Servs., Policy No. 2011/05, *Promoting a Safe and Respectable Environment for Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ) Youth and their Families Involved in the Child Welfare System*; and *Guidelines Promoting a Safe and Respectable Environment for Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ) Youth and their Families Involved with DYFJ* (2011); State of Cal. Health & Human Servs. Agency, Dep't of Social Servs., All County Information Notice I-81-10, *Serving Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ) Youth, LGBTQ Caregivers and LGBT Prospective Foster and Adoptive Parents* (2010); State of Ill., Dep't of Children & Family Servs., Procedures 302. Appendix K, *Support and Well-Being of Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ) Youths* (2009); State of N.Y., Office of Children & Family Servs., PPM 3442.00, *Lesbian, Gay, Bisexual, Transgender and Questioning Youth* (2008); S.B. 518, 2007 Leg., Reg. Sess. (Cal. 2007); State of Haw., Dep't of Human Servs., Office of Youth Servs., Haw. Youth Correctional Facility, Policy No. 1.43.03, *Non-Discriminatory, Developmentally-Sound Treatment of Lesbian, Gay, Bi-Sexual and Transgender (LGBT) Youth* (2007); State of Conn., Dep't of Children & Families, Policy No. 30-9, *Non-Discrimination of LGBTQ Individuals* (2004); A.B. 458, 2003 Leg., Reg. Sess. (Cal. 2003).

Recommended Practice Guidelines to Promote the Safety and Well-Being of LGBTQ Youth and Youth at Risk of or Living with HIV in Child Welfare Settings

The primary goal of the Recommended Practice Guidelines is to improve the safety, permanency and well-being of LGBTQ youth and their families who receive services through the child welfare system.

Federally funded state and local child welfare agencies should ensure that state-run child welfare programs and contracting direct service private providers adhere to the following best practices.

Adopt and Implement Written Policies Prohibiting Discrimination on the Basis of Sexual Orientation, Gender Identity, Gender Expression and HIV Status

- All child welfare agencies should adopt and implement written policies that prohibit discrimination against and harassment of youth, staff and foster and adoptive families, ranging from physical violence to denial of services to the use of slurs, on the basis of actual or perceived sexual orientation, gender identity, gender expression or HIV status.
- The nondiscrimination policies should be included in agency manuals and posted prominently and distributed to all staff, foster families and youth in the system. Contracting agencies should be required to adhere to them as well. Every agency should offer a formal grievance procedure for confidential reporting of violations of the nondiscrimination policy, and should provide prompt, neutral third-party investigations.

Treat LGBTQ Youth with Respect and Competence

- Child welfare staff should not assume that all children in care are heterosexual, non-transgender or gender-conforming. They should examine their own beliefs and attitudes that might negatively impact their professional responsibilities to LGBTQ youth. Child welfare staff owe a professional duty of competent care to LGBTQ youth.
- State child welfare agencies and direct service providers should use intake forms that include questions about a youth's sexual orientation and gender identity in demographic sections, but should not make it a requirement that youth answer these questions. This recommendation is directed to agencies that already have some competence with LGBTQ youth. The information must be kept private, should not be shared with anyone without the youth's express consent and should be updated appropriately.
- Child welfare staff should not characterize an LGBTQ or gender non-conforming identity as deviant or pathological.
- Child welfare staff should be aware of their language and eliminate anti-LGBTQ slurs. They should understand the difference between the concepts "sexual orientation" and "gender identity," and use such terms as "gay," "lesbian," "bisexual," "transgender" and "questioning" in appropriate contexts.
- Child welfare staff should not assume that LGBTQ people are identifiable by stereotypical mannerisms or characteristics. They should also avoid the assumption that all LGBTQ people have similar life experiences or share a common sense of community.

- Child welfare staff should create a positive environment in their work spaces that welcomes and affirms LGBTQ people. Displaying recognizable symbols of support, such as rainbow flags, lets LGBTQ young people know that they are in a safe, welcoming setting.
- If a youth discloses that he or she is LGBTQ, child welfare staff should use the disclosure as an opportunity to show unconditional support for the youth, find the resources that the youth and his or her caregivers need and assist the youth in deciding to whom, where, when and how to come out in order to ensure safety while maintaining privacy.
- Child welfare staff should be prepared to work effectively with transgender youth and affirm their gender identities

in ways that are most appropriate for the youth, including referring to them by the names and pronouns they prefer and by allowing them to dress, groom and express mannerisms consistent with their gender identities.

- LGBTQ youth should have the same rights and privileges as other youth who receive child welfare services. They should not be subjected to harsher or more restrictive standards of behavior because of their sexual orientation or gender identity. Child welfare staff should establish ground rules for the behavior of all youth, including standards for acceptable sexual behavior that are the same for all youth regardless of sexual orientation or gender identity.

Ensure Effective Child Protection Practices that Correctly Identify Abuse and Neglect of LGBTQ Youth

- When performing initial assessments of the safety of and risks for youth who may identify as or be perceived to be LGBTQ, child protection staff should assess whether the parents' or caregivers' attitudes towards the child's sexual orientation and gender identity are impacting the immediate safety of the youth or putting the youth at risk of emotional or physical harm.
- Child protection staff should be trained and prepared to perform family assessments that promote an understanding of the effects of family rejection on the wellbeing of LGBTQ youth.
- Child protection staff should consider whether the youth is at risk of maltreatment and rejecting behaviors, such as

physical punishment because of the youth's sexual orientation or gender identity or expression; verbal harassment or name-calling because of the youth's LGBTQ identity; being required to be "straight" as a condition of remaining in the home; being forbidden from dressing or grooming consistent with the youth's gender identity; being subjected to psychologically-damaging reparative therapy or religious conversions designed to change sexual orientation or gender identity; or pressure to be more masculine or feminine.

- Caseworkers should continue to assess the risk to and safety of LGBTQ youth once placed in foster or kinship care settings.



Ensure Effective Services that Address Family Rejection of LGBTQ Youth and Help Reunification

- Child welfare agencies should engage families of LGBTQ youth in identifying and achieving family-level outcomes that reduce parents' and caregivers' rejecting behaviors toward youth who may identify as or be perceived to be LGBTQ.
- Child welfare agencies should provide families with services and support to help parents and caregivers make the connections between their specific reactions to a youth's actual or perceived sexual orientation and gender identity and the youth's emotional and physical well-being.
- For those families of LGBTQ youth who are already affirming and accepting, child welfare agencies should provide effective services to alleviate the circumstances that led to the removal of the child.

Provide Mandatory LGBTQ Competency Training to All Agency Employees and Volunteers

- Child welfare agencies should mandate that all staff, including administrators, managers, supervisors, social workers, case workers, direct service staff, support staff, facilities maintenance personnel, volunteers and mental and medical health providers with whom the agency contracts, receive mandatory initial and ongoing comprehensive LGBTQ competency training.

“Child welfare staff should help foster and adoptive parents understand that being LGBTQ is a core part of someone's identity.”



Ensure Safe and Supportive Foster or Adoptive Placements for LGBTQ Youth

- When seeking a foster or adoptive home placement for an LGBTQ young person, child welfare staff should be sure that the home is accepting of LGBTQ people.
- All foster and adoptive parents should receive training on caring for an LGBTQ young person, as any child may be LGBTQ.
- Child welfare agencies should engage in outreach to LGBTQ adults and non-LGBTQ adults who are supportive, in order to be able to provide a range of homes that are safe and nurturing for LGBTQ youth.
- Child welfare agencies should not discriminate against prospective or present foster and adoptive parents based on their sexual orientation or gender identity.
- Child welfare staff should not put LGBTQ youth into placements, services, schools or programs where they will be unsafe or unsupported.
- Child welfare agencies should actively recruit and support prospective LGBTQ foster parents. Every national professional child welfare organization strongly supports licensing LGBTQ foster and adoptive parents according to the same standards applied to non-LGBTQ applicants. Child welfare staff should support awareness that LGBTQ people can be good foster and adoptive parents.

Require Mandatory Training for Staff and Foster and Adoptive Parents in Caring for an LGBTQ Child

- Child welfare agencies should require mandatory training for staff and foster and adoptive parents on nondiscrimination policies regarding sexual orientation, gender identity and expression and HIV status; sensitivity to sexual orientation and gender identity and the challenges facing LGBTQ youth; supporting a youth coming out as LGBTQ; and educating LGBTQ youth about their sexuality and sexual health, including prevention of HIV and other sexually transmitted infections.
- Child welfare staff should help foster and adoptive parents understand that being LGBTQ is a core part of someone's identity and not a choice or something the foster or adoptive parents are permitted to try to change in a young person in their care. The leading mental health and child welfare associations have long recognized that a same-sex sexual orientation is a normal variation of human sexuality and no more susceptible to change than a heterosexual sexual orientation. Similarly, gender identity is an innate, immutable part of one's self that is deep-seated and unchangeable.
- Child welfare staff should ensure that caregivers understand that their acceptance or rejection of a youth's sexual orientation and gender identity affects the health and well-being of the LGBTQ youth in their care.

Ensure the Safety and Emotional Development of LGBTQ Youth in Congregate Care

- Child welfare staff have an obligation to protect the physical and psychological well-being of LGBTQ youth in their care, whether these young people are placed in group homes, residential treatment centers or other congregate care facilities, as well as in the schools associated with those placements. Congregate care providers should take immediate steps to address anti-LGBTQ harassment within their facilities. Child welfare staff should send a clear message that anti-LGBTQ harassment will not be tolerated, and they should not blame LGBTQ youth who are open about their identities when others subject them to harassment or violence.
- When LGBTQ youth express typical age-appropriate romantic behaviors, such as hand-holding or kissing, they should be supported in adhering to the same rules that non-LGBTQ youth are required to follow in congregate care settings. LGBTQ youth in congregate care should be afforded the same rights and privileges that non-LGBTQ youth have regarding dating, displays of affection and romantic relationships. LGBTQ youth should be able to express age-appropriate romantic behavior and to feel validated and worthy. Selective enforcement of rules for LGBTQ youth is unacceptable.

- Child welfare staff in congregate settings should make appropriate, individualized classification and housing decisions. They should not make housing decisions based on myths and stereotypes about LGBTQ people, who are no more likely to engage in sexual behaviors than their non-LGBTQ peers. Rather than isolating or segregating LGBTQ young people or prohibiting them from having roommates as a means of ensuring their safety, child welfare staff should work with all youth to ensure that they adhere to nondiscrimination requirements. LGBTQ youth should not be deprived of opportunities to interact with their peers or made to feel more isolated because of their sexual orientation or gender identity and expression.
- Child welfare staff should help reduce the alienation and isolation often experienced by LGBTQ youth by providing them opportunities to interact positively with their LGBTQ peers and to see that other people their age share their experiences. Such opportunities help foster the development of life skills, including creating and maintaining friendships, developing communication skills and handling interpersonal dynamics. If peer support and social groups for LGBTQ youth are not available locally, child welfare staff should assist in developing them.

Support Access to Appropriate Medical and Mental Health Care Services for LGBTQ Youth and Youth at Risk of or Living with HIV

- Child welfare agencies should ensure that health care providers who treat LGBTQ youth are trained and educated on the heightened risks these youth may face. Health-care providers should be able to discuss sexual orientation, gender identity and sexual behaviors openly and comfortably.
- Child welfare agencies should ensure that LGBTQ youth receive developmentally appropriate sexual health education and services. Child welfare staff should provide developmentally appropriate information and resources to all young people about sexuality and sexual health, including LGBTQ issues and prevention of HIV and AIDS and other sexually transmitted infections. If not already in place, child welfare agencies should adopt written policies providing children access to free and confidential HIV testing without parental or guardian consent or notification. Child welfare staff should always protect the privacy of a young person's HIV status, with disclosure only on a need-to-know basis.
- At each stage of HIV-related illness, youth living with HIV who are in care should receive appropriate medical and psychosocial treatment. Medical follow-up and counseling should be available for asymptomatic HIV-infected youth. Group homes, foster parents and caregivers should be encouraged to develop supportive attitudes towards youth in their care affected by HIV or AIDS in order to combat fear and prejudice about people living with HIV or AIDS.
- Child welfare staff should never allow an LGBTQ youth to be subject to so-called conversion or reparative therapy for the purpose of changing the youth's sexual orientation or gender identity. Such therapies have been shunned by the leading national professional mental health associations as unethical and potentially dangerous. Mainstream medical and scientific organizations have discredited their use as harmful and unethical.

Support Access to Safe Educational Services

- It is essential that LGBTQ youth have access to educational environments where they can learn without fear of harassment or assault. School and child welfare staff should work together to make schools safer by helping to implement school safety training on LGBTQ issues. Schools should have policies and training on bullying and nondiscrimination that specifically enumerate and include an LGBTQ focus. School staff should be encouraged to show their support of LGBTQ students by displaying "Safe Zone" stickers or posters and other supportive symbols. If LGBTQ students are able to identify supportive school staff, they are more likely to feel a sense of belonging, develop positive self-esteem, cope with bias and work toward improving school climate.
- Child welfare staff should work with a transgender youth's school to ensure that the youth's gender identity is respected. This includes use of the youth's preferred name and gender pronouns and respecting the choice of age-appropriate attire that matches the youth's gender identity.
- It is essential that transgender youth have access to safe and convenient restroom and locker room facilities. Child welfare staff should make sure that schools make appropriate

restroom and locker room facilities available, honoring the child's gender identity, privacy, dignity and safety needs.

- Child welfare staff should take immediate action to protect an LGBTQ youth facing harassment or discrimination at school. This may include informing the school administration of the harassment and ensuring that remedial steps are taken to respond to the offending behavior. If the youth has been injured or threatened with serious bodily harm, child welfare

staff should be prepared to contact local law enforcement authorities to file a report and to advocate for fair treatment within an investigation and subsequent prosecution. If appropriate actions are not taken as a result of their advocacy, child welfare staff may need to meet with the school board and local police to file an official complaint, or consult an attorney where the situation calls for legal action or remedy.



"LGBTQ youth in congregate care should be afforded the same rights and privileges that non-LGBTQ youth have."

Support Transgender and Gender-Nonconforming Youth

- In order to competently serve and safeguard transgender and gender-nonconforming youth, child welfare staff should understand what it means for a youth to be transgender or gender-nonconforming and should be familiar with and use appropriate terminology.
- Child welfare staff should receive mandatory cultural competency training on gender identity and expression, including education regarding medical treatment for transgender youth diagnosed with GID.
- Child welfare staff have a legal duty to protect the physical and emotional safety of transgender and gender-nonconforming youth. Child welfare staff should take immediate action to end any form of harassment or bullying against transgender and gender-nonconforming youth, whether perpetrated by staff, foster parents or peers.
- Child welfare staff should respect the privacy of transgender and gender-nonconforming youth by treating information about their gender identity as confidential. Disclosure should not occur without first talking with the youth and obtaining consent. Child welfare staff should understand the legal obligations regarding confidentiality and disclosure.
- Child welfare staff should respect a transgender or gender-nonconforming youth's preferred name and gendered pronouns that best reflect the young person's gender identity.
- Child welfare staff should allow transgender and gender-nonconforming youth to express their gender identity through preferred attire, grooming and mannerisms without punishment or ridicule. Child welfare staff should not assume that transgender and gender-nonconforming youth are "acting out" inappropriately when expressing their gender identity.
- Child welfare staff should not isolate or segregate transgender and gender-nonconforming youth based on the unfounded misconception that they are sexually aggressive. Transgender and gender-nonconforming youth, as a group, do not present a danger to other youth simply because of their gender identity and expression or sexual orientation.
- Child welfare staff should avoid making assumptions about the sexual orientation of transgender and gender-nonconforming youth. Transgender and gender-nonconforming youth may identify as gay, lesbian, bisexual, questioning, queer, heterosexual, etc. Sexual orientation is separate from, and not determined by, one's gender identity and expression.
- Child welfare staff should be aware of health care protocols for medical treatment for transgender individuals and should ensure that transgender youth have access to competent and LGBTQ-affirming mental and medical health services, including access to treatment for GID, if deemed medically appropriate. Treatment of GID is focused on providing support, not changing a person's gender identity, and may include services such as individual and family counseling, hormone therapy and surgery to align the physical body with the gender identity of the youth. Staff should ensure that existing transition-related treatment is provided after a youth arrives at an agency or facility.
- In sex-segregated facilities, transgender youth should not be assigned to the girls' or boys' units strictly based on the sex assigned to them at birth. Instead, child welfare staff should make individualized decisions based on the physical and emotional well-being of the youth, taking into account the young person's wishes, the level of comfort and safety, the degree of privacy afforded, the types of housing available and the recommendations of mental health and medical professionals. The safety of transgender and gender-nonconforming youth should be protected without resorting to isolating or segregating the youth from the general population. However, single occupancy rooms, if available in units that correspond with the young person's gender identity, are often appropriate for transgender youth in sex-segregated facilities.
- Child welfare facilities should allow transgender youth to use the bathrooms that match their gender identity. If a youth feels vulnerable to abuse or harassment in any bathroom, or if the youth is housed in a single-sex facility that does not correspond with the youth's gender identity, the facility should permit the youth access to a single-user bathroom. If a single-user bathroom is unavailable, the youth should be allowed to use a multi-user bathroom in private, or should be permitted to use a bathroom that is usually reserved for staff. However, no transgender or gender-nonconforming youth should be forced to use a single-user bathroom.
- Child welfare staff should support the academic achievements of transgender and gender-nonconforming youth and ensure that they are safe in schools. The gender expressions of transgender and gender-nonconforming youth make them



“Treatment of GID is focused on providing support, not changing a person’s gender identity.”

more visible, and therefore more vulnerable, to harassment and violence at school. Some school dress policies make it more difficult for youth to dress consistently with their gender identities. Child welfare staff should take immediate action to protect transgender youth facing harassment or discrimination at school, either on-site or off-site, including protection from being disciplined for expressing their gender identity or being denied access to locker rooms, showers and bathrooms that match their gender identity.

- Child welfare staff should locate and develop resources to help transgender youth with their legal issues. Transgender youth may need assistance and advocacy to obtain proper legal identity documents reflecting gender identification and preferred names, such as birth certificates, state identification cards, driver’s licenses, health insurance cards, social security cards, passports and school identification cards.

Provide Access to LGBTQ Community Programs and Services

- Child welfare agencies should help LGBTQ youth access LGBTQ community services and supportive adult mentors.
- Child welfare agencies should develop an up-to-date list of LGBTQ resources in their local community and distribute

it throughout the child welfare agency, including to youth who may wish to contact community resources on their own.



Adopt Confidentiality Policies

- Child welfare agencies should adopt strict policies for managing confidential information about a young person's sexual orientation and gender identity, in addition to other sensitive information, such as HIV status. Child welfare staff should always respect and maintain an LGBTQ young person's privacy and never disclose confidential information about sexual orientation or gender identity without the child's permission. Information related to the past, present or

future physical or mental condition of an individual is private medical information that may be protected by state and federal privacy laws. Moreover, members of the NASW are bound by a code of ethics requiring a young person's express consent before the release of confidential information.³⁶

³⁶ Nat'l Ass'n of Soc. Workers, *Code of Ethics of the National Association of Social Workers* (approved 1996, rev. 2008).

Ensure that Faith-Based Providers Working with LGBTQ Youth Fulfill their Professional and Legal Obligations

- State child welfare agencies should respect federal and state prohibitions against religious discrimination in the provision of governmentally-supported social services. Faith-based agencies that receive government funds to provide social services or that care for children in state custody must adhere to professional and legal standards of care, providing for nondiscriminatory, competent and nonjudgmental services to LGBTQ youth and foster and adoptive parents.
- An LGBTQ young person should never be placed in a setting where they will be subject to religious condemnation. Child welfare staff and foster parents should acknowledge and examine any anti-LGBTQ biases and religious beliefs they might have. If these personal beliefs might prevent offering nonjudgmental care to an LGBTQ young person, the practitioner or foster parent should seek outside support and make alternative care arrangements. They must put the needs of young people above their own personal religious beliefs.
- Prior to placing an LGBTQ youth, child welfare staff should consider whether the religious beliefs of a prospective caregiver could cause the placement to be not in the child's best interests. Foster families may need guidance to understand the line between their obligations as caregivers and their personal religious beliefs. Where there are strong anti-LGBTQ religious beliefs, staff should assess whether conflicts may arise as a result, and whether the physical or emotional safety of an LGBTQ young person may be jeopardized in that home.
- Child welfare staff should locate LGBTQ-affirming religious communities that can be a resource for finding nurturing foster and adoptive families and mentors for LGBTQ young people. LGBTQ-affirming religious communities can also provide a supportive community for LGBTQ young people in care who wish to participate in religious activities.
- Staff of faith-based providers should not discriminate against prospective or present foster and adoptive parents based on their sexual orientation or gender identity.

Collect and Evaluate Data

- State child welfare agencies should include participants' sexual orientation and gender identity status in demographic data elements and evaluation tools to determine accessibility and outcomes specific to LGBTQ youth. They should ensure

that data is collected by individuals trained to respectfully ask questions about sexual orientation and gender identity, and that confidentiality is respected. The data should be aggregated anonymously and updated regularly.

Conclusion

Lambda Legal and CWLA hope that state child welfare agencies will use these Recommended Practice Guidelines to increase their baseline knowledge of LGBTQ issues, influence their programmatic decisions and priorities, and set higher expectations and performance standards for the services provided to LGBTQ young people in care.

In addition, state child welfare agencies can use these LGBTQ competence standards in planning, organizing and administering services; establishing state and local licensing and accreditation requirements; developing recruiting and

hiring practices; and developing content for training, in-service and staff development programs. In this way, state child welfare agencies can promote increased public interest, understanding and support for LGBTQ-competent services that will more effectively promote the wellbeing of LGBTQ youth in care.

Finally, state child welfare agencies may also incorporate LGBTQ cultural competency objectives into federally mandated activities, such as Child and Family Services Reviews and Program Improvement Plans, to maximize LGBTQ-related proficiency, values, principles, policies and practices.





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NATIONAL CENTER FOR LESBIAN RIGHTS

LEGAL RECOGNITION OF LGBT FAMILIES

I. Legal Parent

A legal parent is a person who is legally-recognized as a child's parent and has the legal right to have custody of a child and make decisions about the child's health, education, and well-being. A legal parent is also financially obligated to support the child.

In a number of states, a person who is not a legal parent does not have any legal decision-making authority over a child, even if that person lives with the child and functions as the child's parent. For example, in some states, a person who is not a legal parent may not be able to consent to medical care for the child or even have the authority to approve things like school field trips. In addition, a non-legal parent may have no rights to custody or even visitation with a child should something happen to the legal parent, and may have no ability to claim the child as a dependent for health insurance. In the absence of a will stating otherwise, a child generally has no right to inherit from a person who is not a legal parent or relative.

All legal parents have an equal right to seek custody and make decisions for their children, as well as the responsibility to support their children. A biological parent does not have any more rights than an adoptive parent or other person who is a legal parent. For example, if a lesbian couple has a child together through donor insemination and completes a second parent adoption, both parents are on completely equal legal footing. If the couple were to separate, each would be equally entitled to custody, which a court would determine based on the best interests of the child without giving an automatic advantage to either parent.

When a legally married couple has a child, they are both automatically presumed to be the legal parents of the child. This means that, if they get divorced, they both remain legal parents unless a court terminates one or both of their parental rights. This presumption applies to same-sex parents when children are born to couples who are married or where their state recognizes their civil union or comprehensive domestic partnership at the time the child is born. Most states have not yet addressed this issue directly, but every state that has considered this question in its highest court has held that the marital presumption and assisted reproduction provisions apply equally to same-sex spouses,¹ and a number of states have changed their statutes to be gender neutral.² **Regardless of whether you are married or in a civil union or comprehensive domestic partnership, NCLR always encourages non-biological and non-adoptive**

parents to get an adoption or parentage judgment, even if you are named on your child's birth certificate.

NCLR also always recommends that same-sex parents and transgender parents ensure that other family protection documents are in place, such as medical authorization, guardianship agreements, wills, advanced directives.

II. Second Parent Adoption

A. An Overview

The most common means by which LGBT non-biological parents establish a legal relationship with their children is through what is generally referred to as a “second parent adoption.” A second parent adoption is the legal procedure by which a co-parent adopts his or her partner’s child without terminating the partner’s parental rights, regardless of marital status. As a result of the adoption, the child has two legal parents, and both partners have equal legal status in terms of their relationship to the child.

Additionally, married same-sex couples can use the stepparent adoption procedures that other married couples may use. States that recognize comprehensive domestic partnerships or civil unions also allow couples joined in these legal unions to use the stepparent adoption procedures. These adoptions have the same effect as a second parent adoption, but they may be faster and less expensive than second parent adoptions, depending on where you live.

It is important to recognize, however, that a same-sex partner who plans the birth or adoption of a child with his or her partner is a parent – not a stepparent. Parents should not have to adopt their own children, but it is legally advisable for LGBT parents to get an adoption or parentage judgment to ensure that their parental rights are fully protected in every state.

B. Availability of Second Parent Adoption

As mentioned above, married same-sex couples can use the stepparent adoption procedures available to all married couples. Registered domestic partners or civil union partners can also use similar adoption procedures in states that recognize their relationship status.

In addition, for unmarried couples and couples who are not in a civil union or registered domestic partnership or similar status, a number of states allow them to get a second parent adoption. The following states have a state statute or appellate court decision allowing same-sex couples to get a second parent adoption or co-parent adoption: California³, Colorado⁴, Connecticut⁵, District of Columbia⁶, Idaho⁷, Illinois⁸, Indiana⁹, Maine¹⁰, Massachusetts¹¹, Mississippi¹², Montana¹³, New Jersey¹⁴, New York¹⁵, Oklahoma¹⁶, Pennsylvania¹⁷, Vermont¹⁸.

States that have allowed second parent adoptions by unmarried same-sex couples in some counties include Alaska, Delaware, Florida, Georgia, Hawaii, Iowa, Louisiana, Maryland, Minnesota, Oregon, Rhode Island, Texas, Washington, and West Virginia. There undoubtedly are counties in other states that have granted second parent adoptions to unmarried same-sex couples.

Until recently, Florida was the only state to categorically prohibit lesbian, gay, and bisexual individuals from adopting, but that state law was held unconstitutional in September 2010.¹⁹ Arkansas previously prohibited anyone cohabiting with an unmarried partner from adopting or being a foster parent, but the Arkansas Supreme Court struck down this statute as unconstitutional.²⁰

Appellate courts in Alabama,²¹ Kansas,²² Kentucky,²³ North Carolina,²⁴ Nebraska,²⁵ Ohio,²⁶ and Wisconsin²⁷ have said that second parent adoptions are not permissible under the adoption statutes in those states either for same-sex or different-sex couples who are not married. However, married same-sex couples can use stepparent adoption procedures in those states.

Utah prohibits anyone cohabiting with an unmarried partner from adopting.²⁸ Utah also gives a preference to married couples over any single adult in adoptions or foster care placement.²⁹ Arizona gives a preference to married couples over a single adult in adoption placement.³⁰ Mississippi has a statute that prohibits “[a]doption by couples of the same gender,” but under the Supreme Court ruling, Mississippi must allow same-sex spouses to adopt on equal terms with other married couples.³¹ Mississippi recently passed a law that may allow adoption service providers to refuse to place children with lesbian and gay single parents or couples if it would burden the exercise of their religion.³² There is currently a case pending challenging Nebraska’s policy that excludes lesbian and gay parents from being foster or adoptive placements for children in state care.³³

C. Recognition of Second Parent Adoptions

Adoptions are court orders, which all states are required by the Full Faith and Credit Clause of the federal Constitution to recognize. For this reason, a final adoption by an LGBT parent must be recognized in every state, even if that state’s own laws would not have allowed the adoption to take place. The United States Supreme Court reaffirmed this principle in a case involving Alabama’s recognition of a Georgia second parent adoption.³⁴ The Supreme Court held that “[a] final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.”³⁵

Courts have also recognized that, as a general rule, an adoption that has become final cannot be challenged later by one of the parties to the adoption. For example, the Iowa Supreme Court held that a parent who had consented to a second parent adoption years earlier could not later

change her mind and seek to challenge the legality of the adoption.³⁶ Courts in a number of states, including appellate courts in Florida, Indiana, Kentucky, Minnesota, Texas, and Wisconsin have issued similar decisions.³⁷ The Texas court found that, in order to give children and adoptive parents finality and stability, Texas statutes prevented an adoption from being attacked for any reason more than six months after it was issued. In one case, the court noted: “The destruction of a parent-child relationship is a traumatic experience that can lead to emotional devastation for all the parties involved, and all reasonable efforts to prevent this outcome must be invoked when there is no indication that the destruction of the existing parent-child relationship is in the best interest of the child.”³⁸ Only one of the many states that has considered this issue, North Carolina, has invalidated a final adoption.³⁹

D. Availability of Adoption Generally

Many LGBT parents adopt children jointly or as single parents. Every state allows a single parent to adopt a child, and no state prohibits adoption by LGBT parents. Every state allows married couples to adopt jointly and a number of states allow unmarried couples to adopt jointly. However, six states currently permit private child placement agencies to discriminate based on their religious beliefs while still operating under a state license, and in some of these states, while receiving state funding. Laws in Michigan⁴⁰, North Dakota⁴¹, South Dakota⁴², Virginia⁴³, Alabama⁴⁴, and Texas⁴⁵ allow private child placement agencies to refuse to provide services based on the agency’s religious beliefs. Mississippi previously passed a bill permitting this kind of discrimination, but a federal district court declared the bill unconstitutional.⁴⁶

III. Parentage Judgment

Adoption is currently the most common means used by LGBT non-biological parents to establish a legal parental relationship with their child. In many states, non-biological and non-adoptive parents who are recognized by their state law as legal parents also have the option of obtaining a parentage judgment. This is sometimes called a “parentage action,” “maternity action,” “paternity action,” or action under the state’s Uniform Parentage Act, known as a “UPA action.” It is extremely important for non-biological parents to get a parentage judgment or adoption as soon as possible to ensure that their parental rights will be fully respected in any state if you move or travel. Having your name on the birth certificate does not guarantee protections if your legal rights are challenged in court – only an adoption or parentage judgment can ensure that parental rights will be respected.

A number of states recognize that a non-biological and non-adoptive parent can be a legal parent in some circumstances, even if they are not married to the birth parent. California, New Mexico, Colorado, Kansas, and New Hampshire have appellate decisions recognizing that a woman who has lived with a child and held herself out as a parent can establish her legal

parentage under their parentage codes.⁴⁷ Delaware recognizes a person who is a *de facto* parent as a legal parent under their parentage statutes.⁴⁸ In some states, where a female same-sex couple plans together to conceive and raise a child using a medical procedure to become pregnant, or where a male same-sex couple uses a surrogate to conceive and bear a child, the intended parents can petition the court to declare the non-biological parent to be a legal parent to the child.⁴⁹ Appellate courts in Illinois, and a trial court in New Jersey, have held that a woman who consents to her partner's insemination can be a legal parent, even if she is not married to the birth mother,⁵⁰ and a few other states have statutes that explicitly provide that either a man or a woman who consents to another woman's insemination is a legal parent, regardless of marital status, including New Mexico, Nevada Washington, and the District of Columbia.⁵¹

Some states, including Indiana,⁵² Maine,⁵³ Nebraska,⁵⁴ Pennsylvania,⁵⁵ and Washington,⁵⁶ have case law recognizing that a non-biological and non-adoptive parent can have all of the rights and responsibilities of parentage based on the following factors: her acceptance of the responsibilities of parentage, living with the child, the legal parent's fostering a parent-child relationship between the child and the non-biological and non-adoptive parent, and the existence of a bonded parent-child relationship.

Parentage judgments can also be obtained when a child is born to a couple who are married, or are in a state that recognizes their civil union or comprehensive domestic partnership. Transgender parents who are not biological parents can also obtain parentage judgments for children born to them and their spouse or partner if they are legally married or in a civil union or comprehensive domestic partnership.

For information about relationship recognition in your state, see NCLR's publication [Marriage, Domestic Partnerships, and Civil Unions: An Overview of Relationship Recognition for Same-Sex Couples in the United States](http://www.nclrights.org), available at www.nclrights.org.

IV. Custody/Visitation

Any legal parent has an equal right to seek custody or visitation, regardless of whether they are a biological parent, adoptive parent, or other legal parent. Between legal parents, there is no preference for biological parents in custody cases.

In addition to the states listed in the previous section that allow non-biological and non-adoptive parents to be recognized as legal parents, many states recognize that, where a same-sex partner participated in the caretaking of the child and maintained a parent-like relationship with the child, he or she has standing (meaning the right to go to court) to ask a court for visitation or custody. Such states have recognized this right to seek visitation or custody under an "equitable parent," "parent by estoppel," "*de facto* parent," "psychological parent," or "*in loco parentis*" theory. State courts that have recognized that a non-biological and non-adoptive

parent may seek visitation or custody even if they are not a legal parent include: Alaska,⁵⁷ Arkansas,⁵⁸ Arizona,⁵⁹ Colorado,⁶⁰ Indiana,⁶¹ Kentucky,⁶² Maine,⁶³ Massachusetts,⁶⁴ Minnesota,⁶⁵ Missouri,⁶⁶ Mississippi,⁶⁷ Montana,⁶⁸ Nebraska,⁶⁹ New Jersey,⁷⁰ New Mexico,⁷¹ North Carolina,⁷² North Dakota,⁷³ Ohio,⁷⁴ Oklahoma,⁷⁵ Pennsylvania,⁷⁶ Rhode Island,⁷⁷ South Carolina,⁷⁸ Washington,⁷⁹ West Virginia,⁸⁰ and Wisconsin.⁸¹ Only a small number of states have said that a non-legal parent has no ability to seek custody or visitation with the child of his or her former partner, even when he or she has been an equally contributing caretaker of the child.⁸²

Many states have enacted statutes giving *de facto* parents or persons who have assumed a true parental role in a child's life a right to seek visitation or custody, including Arizona, Colorado, Connecticut, Delaware, Indiana, Kentucky, Maine, Minnesota, Montana, Nevada, Oregon, South Carolina, Texas, and the District of Columbia.⁸³ For example, the District of Columbia defines *de facto* parents as someone who has taken on the full responsibilities of a parent, held himself or herself out as the child's parent with the permission of the other parent or parents, and either (1) lived with the child since birth or adoption or (2) lived with the child for 10 months out of the last year and formed a "strong emotional bond" with the child with the encouragement of the other parent.⁸⁴

V. Parenting Agreement

Same-sex couples who were not married when their children were born and who live in a state that does not yet permit second parent adoptions or parentage actions may want to draft a parenting agreement. This agreement will not make you a parent, but a number of courts have recognized that parenting agreements permitting another person to have custody or visitation with a child may enforceable in court.⁸⁵ These courts have acknowledged the importance of protecting parent-child bonds that have formed with the agreement of the child's legal parent.

A parenting agreement should specify that, although only one of the parents may be recognized as a legal parent, both parents consider themselves to be the parents of their child, with all of the legal rights and responsibilities that come with being a parent. It should explain that the legal parent waives her exclusive right to custody and control of the child and intends to co-parent equally with the other parent. The agreement should include language that clearly states the couple's intention to continue to co-parent even if their relationship is dissolved.

VI. Voluntary Acknowledgments of Parentage

A voluntary acknowledgment of parentage or a voluntary declaration of parentage (also called a VAP, or VDOP in some states) is a document that establishes a legal relationship between a parent and a child. Most states only allow men who believe they are genetic fathers of their children to sign VAPs, but a small but growing number of states now explicitly allow parents of any gender and non-genetic parents to sign VAPs. VAPs are the same as a court order. This means that parents who sign valid VAPs must be recognized by all U.S. states. It is important to

recognize, however, that until VAPs are more widely available to parents regardless of gender or genetic connection, they may be vulnerable. NCLR strongly recommends that all non-birth parents get an adoption or judgment from a court recognizing that they are a legal parent, even if they are married, and even if they are listed as a parent on the birth certificate and have signed a VAP.

For more information see NCLR's publication [Voluntary Acknowledgments of Parentage](http://www.nclrights.org) available at www.nclrights.org.

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Endnotes

¹ See, e.g., *Roe v. Patton*, 2015 WL 4476734, *3 (D. Utah 2015); *McLaughlin v. Jones*, 243 Ariz. 29 (2017) (holding that Arizona's gendered marital presumption had to be applied in a gender neutral manner); *Strickland v. Day*, 239 So.3d 486 (Miss. 2018); *Hunter v. Rose*, 463 Mass. 488 (2012). *But see In the Interest of A.E.*, 2017 WL 1535101, *10 (Tex App. Beaumont 2017), petition for review filed, (July 12, 2017) (stating in dicta that "[t]he substitution of the word 'spouse' for the words 'husband' and 'wife' would amount to legislating from the bench, which is something that we decline to do.").

² See, e.g., Me. Rev. Stat. tit. 19-A, § 1881; Wash. Rev. Code Ann. § 26.26A.115 (West).

³ *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003).

⁴ COLO. REV. STAT. ANN. §§ 19-5-203(1), 19-5-208(5), 19-5-210(1.5), 19-5-211(1.5).

⁵ CONN. GEN. STAT. ANN. § 45a-724(a)(3) (providing that "any parent of a minor child may agree in writing with one other person who shares parental responsibility for the child with such parent that the other person shall adopt or join in the adoption of the child").

⁶ *M.M.D. v. B.H.M.*, 662 A.2d 837 (D.C. 1995).

⁷ *In re Adoption of Doe*, No. 41463, 2014 WL 527144 (Idaho Feb. 10, 2014).

⁸ *In re Petition of K.M. & D.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995).

⁹ *In re Adoption of M.M.G.C.*, 785 N.E.2d 267 (Ind. Ct. App. 2003); *In re Adoption of K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004). See also *In re Infant Girl W.* 785 N.E.2d 267 (Ind. App. 2006) (same-sex couple may jointly adopt).

¹⁰ *Adoption of M.A.*, 2007 ME 123 (Me. 2007).

¹¹ *In re Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993).

¹² *Matter of Adoption of D.D.H.*, 268 So. 3d 449, 450 (Miss. 2018).

¹³ Mont. Code Ann. § 42-4-302(2) (providing that “[f]or good cause shown, a court may allow an individual who is not the stepparent but who has the consent of the custodial parent of a child to file a petition for adoption. The petition must be treated as if the petitioner were a stepparent.”)

¹⁴ *In re the Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995).

¹⁵ *In re Jacob, In re Dana*, 660 N.E.2d 397 (N.Y. 1995).

¹⁶ *Eldredge v. Taylor*, 2014 OK 92 (2014).

¹⁷ *In re Adoption of R.B.F. & R.C.F.*, 803 A.2d 1195 (Pa. 2002).

¹⁸ *In re Adoption of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993); VT. STAT. ANN. tit. 15A, § 1-102(b) (providing that, if family unit consists of parent and parent’s partner, partner of parent may adopt child without terminating parent’s rights)).

¹⁹ *Fla. Dep’t of Children & Families v. X.X.G.*, 45 So.3d 79 (Fla. Ct. App. 2010) (Florida’s Third District Court of Appeal held that the ban had no rational basis and violated the equal protection guarantee of the Florida Constitution). This decision is binding on all Florida trial courts. The Florida Department of Children and Families has issued a memorandum instructing its staff to immediately cease questioning prospective adoptive parents about their sexual orientation and not consider sexual orientation as a factor in determining fitness to adopt. The Department’s staff are to focus instead on the quality of parenting that adoptive parents would provide, and their commitment to love an adopted child.

²⁰ *Arkansas Dept. of Human Services v. Cole*, 2011 Ark. 145 (Ark. April 7, 2011) (striking Arkansas Initiative Act 1 (2008) as violating the Arkansas Constitution).

²¹ *In re Adoption of K.R.S.*, 109 So.3d 176 (Ala. Ct. App. 2012) (refusing to allow a same-sex couple who had married in another state to use the stepparent adoption procedures). Previously, some attorneys had obtained second-parent adoptions in some counties.

²² *Adoption of I.M.*, 48 Kan.App.2d 343 (Kan. Ct. App. 2012).

²³ *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804 (Ct. App. Ky. 2008) (holding that the biological mother could not challenge her partner’s adoption of the child more than a year after the adoption was finalized, but noting in dicta that an unmarried couple cannot use the stepparent adoption procedures in Kentucky to establish legal parentage for both partners).

²⁴ *Boseman v. Jarrell*, 704 S.E.2d 494 (N.C. 2010).

²⁵ *In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002).

²⁶ *In re Adoption of Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998).

²⁷ *In the Interest of Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994).

²⁸ UTAH CODE ANN. § 78B-6-117(3).

²⁹ UTAH CODE §§ 78A-6-307(19), 78B-6-117 (4).

³⁰ Ariz. Rev. Stat. § 8-103.

³¹ MISS. CODE ANN. § 93-17-3(5).

³² See Mississippi Religious Freedom Restoration Act, Miss. S.B. 2681, 2014 Reg. Sess., effective July 1, 2014.

³³ *Stewart and Stewart v. Heineman*, ACLU Case Summary, available at <https://www.aclu.org/lgbt-rights/stewart-and-stewart-v-heineman>.

³⁴ *V.L. v. E.L.*, 136 S. Ct. 1017 (2016).

³⁵ *Id.* at 1020. In an earlier case, the Fifth Circuit Court of Appeals, however, refused to allow same-sex parents to challenge Louisiana's refusal to issue an amended birth certificate for a child adopted by a same-sex couple based on procedural issues, but explained that all states must recognize valid adoptions from other states. *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011) (en banc) (holding that Louisiana's policy of refusing to amend birth certificates of children adopted by unmarried couples, could not be challenged in federal court and opining in dicta that Louisiana's practice did not violate full faith and credit).

³⁶ *Schott v. Schott*, 744 N.W.2d 85 (Iowa 2008).

³⁷ *In re Adoption of D.P.P.*, No. 5D13-1766, 2014 WL 2109130 (Fla. Dist. Ct. App. May 21, 2014); *In re Christian J.W.*, 803 N.W.2d 869, 337 Wis.2d 91 (Wis. Ct. App. 2011) (unpublished decision); *In re Adoption of T.A.M. and E.J.M.*, 791 N.W.2d 573 (Minn. App. 2010); *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804 (Ct. App. Ky. 2008); *Mariga v. Flint*, 822 N.E.2d 620 (Ind. Ct. App. 2005); *Goodson v. Castellanos*, 214 S.W.3d 741 (Tex. App. 2007), *reh'g overruled* (Mar 01, 2007), *rev. denied* (Feb 22, 2008); *Hobbs v. Van Stavern*, 2006 WL 3095439 (Tex. App. 2006), *rev. denied* (Feb 22, 2008).

³⁸ *Goodson*, 214 S.W.3d at 749.

³⁹ *Boseman v. Jarrell*, 704 S.E.2d 494 (N.C. 2010) (holding that a final second parent adoption by the same-sex partner of the biological mother was void).

⁴⁰ Mich. Comp. Laws Ann. § 722.124e (West 2015) ("To the fullest extent permitted by state and federal law, a child placing agency shall not be required to provide any services if those services conflict with, or provide any services under circumstances that conflict with, the child placing agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child placing agency. . . .")

⁴¹ N.D. Cent. Code § 50-12-07.1 (West 2009) ("A child-placing agency is not required to perform, assist, counsel, recommend, facilitate, refer, or participate in a placement that violates the agency's written religious or moral convictions or policies. . . .")

⁴² South Dakota SB 149 (2017), 2017 South Dakota Laws Ch. 114, text available at <http://www.sdlegislature.gov/docs/legsession/2017/Bills/SB149P.htm> (amending chapter 26-6 of the South Dakota Code to include "[n]o child-placement agency may be required to provide any service that conflicts with, or provide any service under circumstances that conflict with any sincerely-held religious

belief or moral conviction of the child-placement agency that shall be contained in a written policy, statement of faith, or other document adhered to by a child-placement agency.”)

⁴³ VA. Code Ann. § 63.2-1709.3 (West 2012) (“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. . . .”)

⁴⁴ H.B. 24, 2017 Leg. (Ala. 2017) (“The state may not refuse to license or otherwise discriminate or take an adverse action against any child placing agency that is licensed by or required to be licensed by the state for child placing services on the basis that the child placing agency declines to make, provide, facilitate, or refer for a placement in a manner that conflicts with, or under circumstances that conflict with, the sincerely held religious beliefs of the child placing agency provided the agency is otherwise in compliance with the requirements of the Alabama Child Care Act of 1971, Chapter 7, Title 38, Code of Alabama 1975, and the Minimum Standards for Child Placing Agencies.”)

⁴⁵ H.B. 3859, 2017 Leg. (Tex. 2017) (“A governmental entity or any person that contracts with this state or operates under governmental authority to refer or place children for child welfare services may not discriminate or take any adverse action against a child welfare services provider on the basis, wholly or partly, that the provider . . . has declined or will decline to provide, facilitate, or refer a person for child welfare services that conflict with, or under circumstances that conflict with, the provider’s sincerely held religious beliefs.”)

⁴⁶ H.B. 1523, 2016 Leg. (Miss. 2017); *Barber v. Bryant*, Case 3:16-cv-00417-CWR-LRA (S.D. Miss. 2016), <http://www.southernequality.org/cse-litigation-summary/legal-challenge-hb-1523/>.

⁴⁷ *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (holding that the same-sex partner of a biological parent can be a presumed parent under California Family Code § 7611(d) where she receives the child into her home and holds the child out as her own); *In re S.N.V.*, 2011 WL 6425562 (Colo. App. 2011); *Chatterjee v. King*, 280 P.3d 283 (N.M. 2012); *Frazier v. Goudschaal*, 296 Kan. 730 (2013); *In re Guardianship of Madelyn B.*, No. 2013-593, 2014 WL 2958752 (N.H. July 2, 2014). Other states have also recognized that paternity statutes apply equally to women. See *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000); *In re Roberto d.B.*, 923 A.2d 115 (Md. 2007).

⁴⁸ DEL. CODE ANN. tit. 13, § 8-201, 2302 (providing that a legal parent includes a “de facto parent” who has a “parent-like relationship” established with the support and consent of the legal parent, has “exercised parental responsibilities,” and 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”). *Smith v. Guest*, No. 252, 2010, 2011 WL 899550 (Del. Mar 14, 2011) (upholding de facto parent statutes and holding that the legislature expressly intended the statutes to apply retroactively).

⁴⁹ See, e.g., *Sinnott v. Peck*, 180 A.3d 560, 563 (Vt. 2017); *Partanen v. Gallagher*, 475 Mass. 632 (2016); *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016); *St. Mary v. Damon*, 309 P.3d 1027, 1029 (Nev. 2013); *D.M.T. v. T.M.H.*, 129 So.3d 320 (Fla. 2013), rehearing denied; *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005); *Raftopol v. Ramey*, 12 A.3d 783 (Conn. 2011).

⁵⁰ *In re T.P.S.*, 978 N.E.2d 1070 (Ill. Ct. App. 2012). *See also, In re Parentage of Robinson*, 383 N.J. Super. 165 (N.J. Ch. Div. 2005) (woman who consented to her same-sex partner's insemination is presumed to be a parent).

⁵¹ Nev. Rev. Stat. 126.670 and 126.680; N.M. Stat. Ann. § 40-11A-703; Was. Rev. Code Ann. § 26.26.710; D.C. Code § 16-909(e)(1).

⁵² *King v. S.B.*, 837 N.E.2d 965, 967 (Ind. 2005). *But see A.C. v. N.J.*, 1 N.E.3d 685 (Ind. Ct. App. 2013)

⁵³ *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1151 (Me. 2004) (once an individual is found to be a de facto parent, a court may award "parental rights and responsibilities to that individual as a parent"). *See also Pitts v. Moore*, 2014 ME 59, No. Yor-12-440 (Me. April 17, 2014), *decision not yet released for publication*.

⁵⁴ *Latham v. Schwerdtfeger*, 282 Neb. 121, 802 N.W.2d 66 (Neb. 2011); *Russell v. Bridgens*, 647 N.W.2d 56 (Neb. 2002).

⁵⁵ *L.S.K. v. H.A.N.*, 813 A.2d 872, 876 (Pa. Super. Ct. 2002) ("The rights and liabilities arising out of [*in loco parentis* status] are the same as between parent and child.").

⁵⁶ *In re Parentage of L.B.*, 122 P.3d 161, 708 (Wash. 2005) ("a de facto parent stands in legal parity with an otherwise legal parent").

⁵⁷ *Kinnard v. Kinnard*, 43 P.3d 150 (Alaska 2002).

⁵⁸ *Bethany v. Jones*, No. 10-295, 2011 Ark. 67, 2011 WL 553923 (Ark., Feb 17, 2011).

⁵⁹ *Thomas v. Thomas*, 203 Ariz. 34, 49 P.3d 306 (Ariz. App. Div. 1, 2002).

⁶⁰ *In the Interest of E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004), cert. denied, 2004 WL 2377164 (Colo. 2004), cert. denied sub nom, *Clark v. McLeod*, 545 U.S. 1111 (2005).

⁶¹ *King v. S.B.*, 837 N.E.2d 965 (Ind. 2005).

⁶² *Pickelsimmer v. Mullins*, 317 S.W.3d 569 (Ky. 2010).

⁶³ *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004).

⁶⁴ *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999).

⁶⁵ *Soohoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007).

⁶⁶ *K.M.M. v. K.E.W.*, 539 S.W.3d 722 (Mo. Ct. App. 2017).

⁶⁷ *Logan v. Logan*, 730 So. 2d 1124 (Miss. 1998).

⁶⁸ *Kulstad v. Maniaci*, 352 Mont. 513 (Mt. 2009).

⁶⁹ *Latham v. Schwerdtfeger*, 282 Neb. 121, 802 N.W.2d 66 (Neb. 2011); *Russell v. Bridgens*, 647 N.W.2d 56 (Neb. 2002).

⁷⁰ *V.C. v. J.M.B.*, 748 A.2d 539 (N.J. 2000).

⁷¹ *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992).

⁷² *Mason v. Dwinell*, 660 S.E.2d 58 (N.C. Ct. App. 2008) (district court properly awarded joint custody to same-sex co-parents because the legal mother “acted in a manner inconsistent with her constitutionally-protected paramount interest”). *But see Estroff v. Chatterjee*, 660 S.E.2d 73 (N.C. Ct. App. 2008) (trial court properly denied lesbian non-legal mother custody because the facts did not support a finding that the legal mother “acted in a manner inconsistent with . . . her constitutionally-protected status as a parent”).

⁷³ *McAllister v. McAllister*, 779 N.W.2d 652, 658 (N.D. 2010).

⁷⁴ *In re Bonfield*, 97 Ohio St. 3d 387, 780 N.E.2d 241 (2002); *In re Mullen*, 129 Ohio St. 3d 417, 953 N.E.2d 302 (2011).

⁷⁵ *Eldredge v. Taylor*, 339 P.3d 888 (Okla. 2014).

⁷⁶ *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001); *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa. Super. Ct. 1996); *L.S.K. v. H.A.N.*, 813 A.2d 872 (Pa. Super. Ct. 2002).

⁷⁷ *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000).

⁷⁸ *Marquez v. Caudill*, 376 S.C. 229, 656 S.E.2d 737 (2008).

⁷⁹ *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005).

⁸⁰ *In re Clifford K.*, 619 S.E.2d 138 (W. Va. 2005).

⁸¹ *In re the Custody of H.S.H.-K.: Holtzman v. Knott*, 533 N.W.2d 419 (Wis. 1995), *cert. denied*, 516 U.S. 975 (1995).

⁸² *See, e.g., Jones v. Barlow*, 154 P.3d 808 (Utah 2007); *White v. White*, 293 S.W.3d 1 (Mo. 2009).

⁸³ *See, e.g.,* ARIZ. REV. STAT. ANN. §§ 25-402, 25-409 (a person who stands *in loco parentis* to a child to seek custody or visitation under certain circumstances); COLO. REV. STAT. ANN. § 14-10-123(1)(c) (establishing standing to seek custody or visitation “[b]y a person other than a parent who has had the physical care of a child for a period of six months or more, if such action is commenced within six months of the termination of such physical care”); CONN. GEN. STAT. ANN. §§46b-56 & 46b-59 (providing that, in a dissolution proceeding, a court may grant reasonable visitation or custody to a person who is not a parent); DEL. CODE ANN. tit. 13, § 8-201, 2302 (providing that a legal parent includes a “de facto parent” who has a “parent-like relationship” established with the support and consent of the legal parent, has “exercised parental responsibilities,” and 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”); D.C. CODE §16-831.01 et seq. (providing that a “de facto parent” has standing to seek custody or visitation); IND. CODE ANN. § 31-9-2-35.5 (establishing standing to seek custody or visitation by a “de facto custodian” who “has been the primary caregiver for, and financial support of, a child” for specified periods depending on age of child); KY. REV. STAT. ANN. 403.270(1) (establishing standing to seek custody or visitation by a

“de facto custodian” who “has been the primary caregiver for, and financial support of, a child” for specified periods depending on age of child); ME. REV. STAT. ANN. tit. 19-A, § 1653(2) (court may grant reasonable visitation to a third party); MINN. STAT. ANN. § 257C.01 *et seq.* (permitting “de facto custodian” or “interested third party” as defined by statute to seek custody or visitation under specified circumstances); MT. CODE ANN. §§ 40-4-211(4)(b), 40-4-228 (a non-legal parent can seek custody or visitation if it is established by clear and convincing evidence that he or she has a “child-parent” relationship and the legal parent has “engaged in conduct contrary to the child-parent relationship”); NEV. REV. STAT. § 125C.050 (a person who has lived with the child and established a “meaningful relationship” may seek reasonable visitation if a parent has unreasonably restricted visits); OR. REV. STAT. ANN. § 109.119 (establishing standing to seek custody or visitation by a person who, within the previous six months, had physical custody of the child or lived with the child and provided parental care for the child); S.C. CODE ANN. § 63-15-60 (establishing standing to seek custody or visitation to a “de facto custodian” who has been a child’s primary caregiver and financial supporter for a specified period of time based on the child’s age); TEX. FAM. CODE ANN. § 102.003 (9) (establishing standing to seek custody or visitation by “a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition”).

⁸⁴ D.C. CODE § 16-831.01 states:

(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.

⁸⁵ See, e.g., *Eldredge v. Taylor*, 339 P.3d 888 (Okla. 2014); *Frazier v. Goudschaal*, 296 Kan. 730 (2013); *In re Bonfield*, 97 Ohio St. 3d 387, 780 N.E.2d 241 (2002); *Rubano v. DiCenzo*, 759 A.2d 959 (R. I. 2000) (holding that the former same-sex partner of a child’s biological mother was entitled to seek a remedy for the biological mother’s alleged violation of the parties’ visitation agreement); *In re the Custody of H.S.H.-K.: Holtzman v. Knott*, 533 N.W.2d 419 (Wis. 1995) (holding that courts may “grant visitation apart from [custody and visitation statutes] on the basis of a co-parenting agreement between a biological parent and another when visitation is in a child’s best interest”); *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992), *writ of certiorari denied C.B. v. A. C.*, 827 P.2d 837 (N.M. 1992) (holding that the former same-sex partner of a child’s biological mother could seek enforcement of an agreement for shared custody or visitation

and the agreement was enforceable, subject to the court's best interest determination); *Morgan v. Kifus*, 2011 WL 1362691 (Va. Ct. App. 2011) [unpublished].

RELATIONSHIPS AT RISK:

Why We Need to Update State Parentage Laws to Protect Children and Families

June 2023



MAP
movement advancement project ►

Author

COLAGE

**FAMILY
EQUALITY**

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LEGAL ADVOCATES
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NATIONAL CENTER FOR LESBIAN RIGHTS

LGBTQ+ Issues - 92

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This report was authored by:

Movement Advancement Project

MAP's mission is to provide independent and rigorous research, insight, and communications that help speed equality and opportunity for all people. MAP works to ensure that all people have a fair chance to pursue health and happiness, earn a living, take care of the ones they love, be safe in their communities, and participate in civic life. For more information, visit www.mapresearch.org.

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COLAGE unites people with one or more lesbian, gay, bisexual, transgender, queer, intersex, and/or asexual parent into a network of peers and supports them as they nurture and empower each other to be skilled, self-confident, and just leaders in our collective communities. Learn more at www.colage.org.

Family Equality

Family Equality works to create a world where everyone can experience the love, safety, and belonging of family. They work to ensure that everyone has the freedom to find, form, and sustain their families by advancing LGBTQ+ equality through advocacy, support, storytelling, and education. Learn more at www.familyequality.org.

GLBTQ Legal Advocates & Defenders (GLAD)

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders (GLAD) works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. Learn more at www.glad.org.

National Center for Lesbian Rights (NCLR)

NCLR is a national legal organization committed to advancing the civil and human rights of lesbian, gay, bisexual, and transgender people and their families through litigation, legislation, policy, and public education. Learn more at www.nclrights.org.

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INTRODUCTION

There are more than 18 million LGBTQ adults living in the United States,¹ and nearly one in three are raising children under the age of 18.² LGBTQ parents and their families are diverse, including in their race and ethnicity, religion, education, and gender, where they live, and how their families formed. Over the past 50 years, the number of children with LGBTQ parents has grown, as has the visibility of LGBTQ families. Children raised by LGBTQ parents are part of many communities across the country and are thriving.³

Central to the wellbeing of all children, regardless of whether their parents are LGBTQ, is forming stable and secure bonds with their caregivers, most often their parents. Secure attachment to parents is critical for the emotional, social, physical, and developmental health of children.⁴ At the core of maintaining the connection between a parent and a child is a legal child-parent relationship, called “parentage.” Parentage—that is, a legally recognized and secure relationship between a child and their parent(s)—is central to ensuring that children have access to numerous protections. From parentage, many rights and responsibilities flow. For example, parentage impacts many mundane but important day-to-day activities like being picked up from daycare or school or attending a routine appointment as well as more urgent needs such as access to emergency medical care, planning for children’s educational future, and custody and inheritance rights in the event of the death of a parent.

Unfortunately, state laws establishing parentage have not always kept pace with the diverse ways families, especially LGBTQ families, form. Many of the hundreds of thousands of children born each year to families who utilize assisted reproduction, for example, are left to navigate complicated, costly, and time-consuming processes to have the law recognize them as the families they already are. In some families, especially LGBTQ families, children may have one or more parents with whom they lack a legal tie. When state laws fail to recognize the diversity of families and lack clear, simple, and financially accessible processes to establish a legal parent-child relationship, children are vulnerable.

Outdated, incomplete, and confusing parentage laws in states should be updated so all children can be legally connected to their parents. It is important that all children, including those in LGBTQ families, are legally connected to the people they know and love as parents. **This report**

examines the various ways in which LGBTQ families form and the efforts underway to ensure that all children, regardless of where they are born or who their parents are, can establish legal parent-child security.

There is no more important moment than now for this work to protect children and families. In June of 2022, the U.S. Supreme Court revoked Americans’ longstanding constitutional right to abortion in the landmark *Dobbs v. Jackson Women’s Health Organization* decision. Overturning well-settled precedent is alarming. Additionally, in his concurrence, Associate Justice Clarence Thomas called into question and invited the Court to revisit its decisions in cases protecting the right to marriage equality, contraception, and intimate sexual relationships. The current patchwork of state parentage laws, along with currently unenforceable laws in place in many states that still prohibit marriage for same-sex couples, leaves some children and families unprotected. This threat has left many LGBTQ families feeling insecure about the future of their family’s legal ties.⁵ At the same time, the political rhetoric of lawmakers and judges is calling into question the legitimacy of LGBTQ families, their ability to be visible in their communities and in schools, and their right to be protected like all other families.

WHAT LGBTQ FAMILIES LOOK LIKE TODAY

Recognizing the myriad ways that children come into our families is critical to advancing state laws that allow for the establishment of secure legal ties between parents and children and essential to promoting the health, wellbeing, and stability of children. People form families in many ways, including through assisted reproduction, adoption, and surrogacy, and this is especially true for LGBTQ families.

The 2019 LGBTQ+ Family Building Survey of LGBTQ adults looking to start or expand their families demonstrated the many potential paths to parenting for this community.⁶ For example, nearly 60% of respondents were considering private adoption; 41% were considering assisted reproductive technology;^a and 37% indicated they were considering conceiving children through intercourse, as shown in *Figure 1* on the next page. The

^a Assisted reproductive technology (ART) refers specifically to fertility treatments in which either eggs or embryos are handled. The most frequent type of ART is in vitro fertilization in which eggs are extracted and fertilized using sperm (either from a donor or an intended parent) in a laboratory, and then the resulting embryo is implanted into the uterus of an intended parent or a person acting as a gestational surrogate who carries the pregnancy to term.

same survey found that 73% of LGBTQ+ people who were already parents reported that their children were conceived through intercourse.⁷ In a 2022 survey of LGBTQI+ people, a similar share of parents (78%) had their children through intercourse, though only 43% of people who aspire to become parents indicated this would be the path to parenting.⁸ In part, this reflects the history of LGBTQ families, in which many children were conceived in the context of a previous different-sex relationship. This also demonstrates the extent to which more than half of LGBTQ people identify as bisexual, and they have created families with a different-sex partner through intercourse.

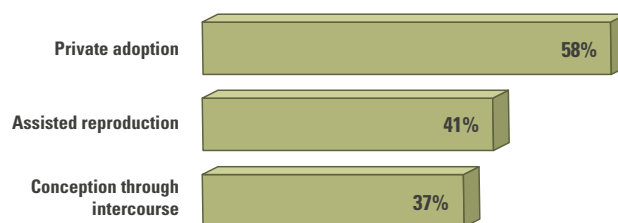
When LGBTQ people seek to grow their family through *assisted reproduction*, that can take many forms. Assisted reproduction means conceiving a child without sexual intercourse and can include assisted reproduction using gametes (egg and sperm) from intended parents or from an egg donor or sperm donor or both. For example, female same-sex couples may utilize donor sperm either from a sperm bank using an “unidentified donor” or from a friend or family member (an “identified donor”). They may also utilize in vitro fertilization (IVF), sometimes through a process called “reciprocal IVF” where one partner’s egg is used to create an embryo that is implanted in another partner who carries the pregnancy to term. Transgender people may similarly utilize assisted reproduction or fertility preservation care prior to receiving prescribed, medically necessary care related to transition.

LGBTQ families may also utilize a specific type of assisted reproduction—surrogacy—to create families. Surrogacy is an arrangement in which an individual carries and delivers a child with the intention that other individuals will be the parents of the child. The person acting as surrogate becomes pregnant through assisted reproduction with an embryo from genetic material of one or both intended parents or donated gametes. This type of surrogacy is sometimes called “gestational surrogacy.” For example, male same-sex couples may rely on an egg donor and another person acting as a gestational surrogate to build their family. In “genetic surrogacy,” the person acting as a surrogate carries the pregnancy and also provides the egg for the pregnancy. Genetic surrogacy can be done through insemination, rather than through IVF.

Many children join LGBTQ families through *adoption*. Research from the Williams Institute shows that same-sex couples are seven times more likely be raising an

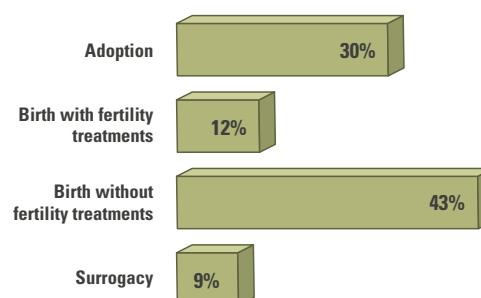
Figure 1: LGBTQ Adults Consider Many Paths to Becoming Parents

Figure 1a: 2019 LGBTQ+ Family Building Survey



Source: Family Equality Council (2019) *LGBTQ Family Building Survey*.

Figure 1b: 2022 LGBTQI+ Economic and Financial Survey



Source: Source: Center for LGBTQ Economic Advancement & Research (CLEAR) and Movement Advancement Project (MAP). March 2023. The LGBTQI+ Economic and Financial (LEAF) Survey: Understanding the Financial Lives of LGBTQI+ People in the United States. San Francisco: CLEAR.

adopted or foster child than are different-sex couples.⁹ LGBTQ people and same-sex couples may adopt a child through the child welfare system or may undertake an agency adoption.^b

There are, of course, millions of families in the United States who have come to be families through the blending of parents and their children. While a parent may not have always been a parent to a child, many parents come to be primary caregivers and parents to children through these connections.¹⁰

Regardless of the many ways in which children are welcomed into their families, being able to establish parentage—to have a legally recognized relationship—is vital for the stability and security of children. On pages 5-11, this report outlines the ways in which parents and children can establish that legal connection.

^b It is important to note the ways in which the child welfare system functions as a family regulation system. The regulation of families is disproportionately experienced by families of color, resulting in an overrepresentation of children of color in the child welfare system.

IMPORTANCE OF PARENTAGE FOR CHILDREN

While the term “parentage” may seem technical and like legalese, it is a concept that is vitally important for children.



Emotional, social, and developmental importance of parentage. Legally establishing parentage provides the foundation for stability, security, and permanency for children, all of which are critical for healthy child development. Children do best when they can count on the people they love to care for them. Secure attachment of children to their caregivers is core to physical, neurological, and cognitive development.¹¹ Abrupt separation from a parent—the disruption of a secure attachment—is damaging for a child. Having a secure parent-child relationship buffers a child from stressors on that key nurturing relationship. When children have this strong foundation, it allows them to navigate and cope with the inevitable bumps and challenges of the world.



Legal protections of parentage. When there is a legal parent-child relationship, parents have a right to physical custody, to make medical, educational, and legal decisions, and to visit a child in the hospital to provide comfort and support. Parentage ensures the parent-child relationship can endure even if parents separate or if one parent passes away.



Economic benefits of parentage. Children gain important rights and benefits from having established parentage. For example, children are eligible for tangible benefits such as safety net supports like food and daycare assistance, social security disability and survivor and veteran’s benefits, eligibility for health insurance through a parent, child support, and more. Children can inherit money and assets from, and sue for the wrongful death of, a deceased parent.

PATCHWORK OF LAWS LEAVES FAMILIES AT RISK

Children join families in many ways, but their need for love, security, and stability is the same. Regardless of who their parents are or where they are born, children all need to be able to establish legal parent-child relationships with the people who parent them.

Just as there are many ways that children join families, including LGBTQ families, there are various pathways to establishing parentage for children.

Recognizing the importance of parentage for children, courts and state statutes have long sought to ensure that children are legally connected to the people who parent them. This has happened through individual court cases, high-level court rulings, and legislation passed to provide clarity and consistency for all children in a state. Parentage law largely remains the purview of states. There are several ways that parent-child legal relationships can be established, and each state varies slightly in its legal framework.

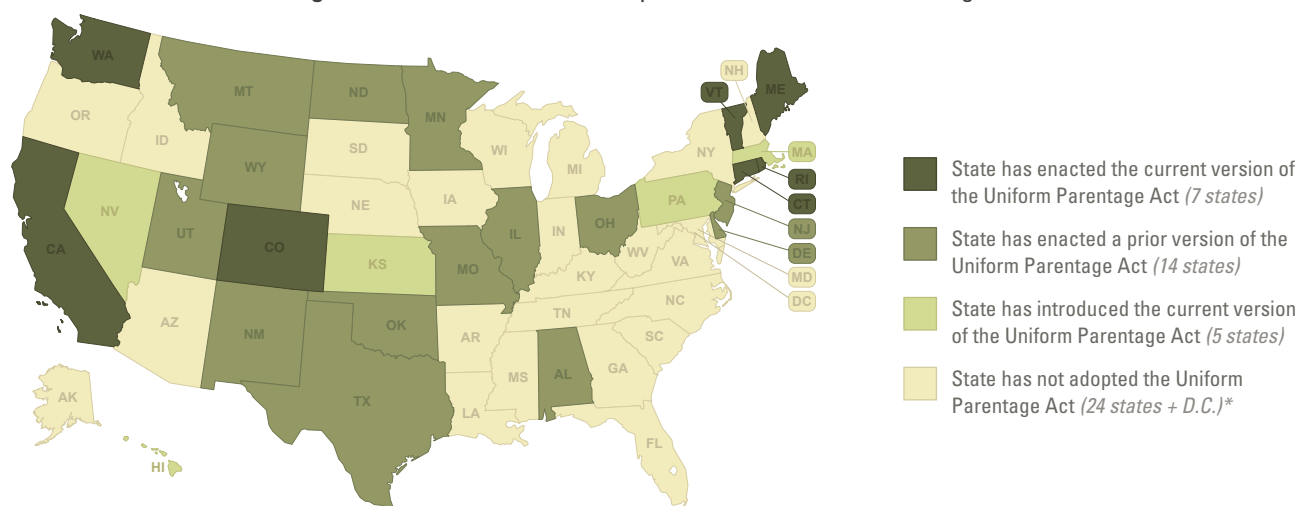
While several states have taken steps to update their family law statutes to ensure that all parent-child relationships are protected, some have not. For example, in some states, even if an adult lives with a child and acts as their parent, they may not be recognized as a legal parent, and therefore will not have access to the rights, responsibilities, and benefits for children and their families that come from parentage. Variation across the country can be challenging and confusing for LGBTQ families and may mean that some children may not be able to establish parentage with their parents. Without clear pathways for establishing parentage, family law courts have been left to wrestle with the questions of parentage. The result for children can be uncertainty, confusion, and protracted disputes, which can take longer to resolve and may result in children being separated from a parent they know, love, and depend on.

Every state should have clear, accessible ways to establish legal ties between children and their parents. Legal ties not only allow families to have the certainty their family will have access to benefits, such as health insurance, but also make certain that if something happened to a parent, such as death, separation, or divorce, the relationship between parents and children will endure.

Pathways to Parentage for Children

So how can states ensure that all children, regardless of who their parents are or the circumstances of their birth, have the protection of parentage? The Uniform Law Commission, a bipartisan group of experts from across the country, has created a model for state parentage statutes called the Uniform Parentage Act (UPA). The UPA underlies parentage laws of the majority of states in the United States. The Uniform Law Commission occasionally issues updated versions of the UPA designed to keep

Figure 2: Seven States Have Adopted the 2017 Uniform Parentage Act



*Of these 24 states, there are states which have passed comprehensive parentage protections that are simply not based on the UPA. The include New York and New Hampshire.

Source: Uniform Law Commission, "Parentage Act 2017 Legislative Bill Tracking," as of April 25, 2023.

up with the needs of families given the importance of parentage to the wellbeing of children. The most recent version, the 2017 UPA, is the most comprehensive model for ensuring all children can have an equitable path to parentage and reflects how families—including LGBTQ families—are formed today.^c

Figure 3, the infographic on the next page, outlines key avenues for establishing parentage, including those outlined in the 2017 UPA. These include:

- **Giving birth to a child** (and not acting as a surrogate)
- **Presumption of Parentage:**
 - Marital Presumption: being married to a person who gives birth to a child.
 - Non-marital Presumption: Holding oneself out as the parent of a child.
- **Voluntary Acknowledgment of Parentage:** Certain people are authorized to establish parentage by signing a legal document along with the birth parent. An acknowledgment is the equivalent of a court decree of parentage.
- **Adjudication of Parentage:** Obtaining a court judgment establishing that one is a parent under the state's parentage laws. Depending on the law in the state, this judgment might be based on many grounds, including having held oneself out as a parent, biology, having been married to a person who gave birth to a child, or functioning as a parent and meeting specific criteria such as outlined in *de facto* parent statutes.

- **Adoption:** This can include adoption of a child whose existing parents' rights have been relinquished or terminated and a new parent-child legal tie is created, or a confirmatory, stepparent, or second-parent (or co-parent) adoption to establish parentage for a child whom someone has been parenting.
- **Assisted Reproduction:** Validly consenting to assisted reproduction with the intent to be a parent of the resulting child.
- **Surrogacy:** Entering into a valid gestational or genetic surrogacy agreement with the intent to be a parent of the resulting child.

Each pathway results in parentage. Even though parentage arises as a matter of law under many of these doctrines, many parents, who are and should be recognized by the law of their home jurisdiction as parents, nonetheless seek to obtain a court order or judgment.¹³ Most do this because of discrimination facing LGBTQ parents and to provide additional security to ensure recognition of their legal relationship in all jurisdictions. A parentage judgment from one state must be given Full Faith and Credit by another state under the U.S. Constitution.^d

^c As shown in Figure 2, seven states have enacted the most recent version of the UPA—the 2017 UPA—or have adopted substantially similar legislation, while another 14 states currently have a previous version of the UPA.¹² Five states have recently introduced legislation to adopt the current version of the UPA.

^d One of the most common ways to obtain a court order or judgement is through adoption. However, this option is not available to all because of local adoption laws, cost, lack of access to courts or lawyers, and other factors. No child should lose a legal parent due to a lack of adoption.

PATHWAYS TO ESTABLISHING PARENTAGE



Below are the key avenues for establishing parentage. Unfortunately, not all these pathways to legal parentage are available to LGBTQ families in all states. The 2017 UPA offers model state parentage statutes for states to ensure that all children have an equitable path to parentage and that state parentage statutes reflect how families, including LGBTQ families, are formed today.



Voluntary Acknowledgment of Parentage

Along with the birth parent, signing a legal document



Adjudication of Parentage

A court order establishing parentage as a result of meeting certain criteria



Adoption



Assisted Reproduction

Consenting to assisted reproduction with the intent to be a parent of the resulting child



Surrogacy

Entering into an agreement with the intent to be a parent of a child born via a surrogate



Presumption of Parentage

- Being married to a person who gives birth to a child
- Holding oneself out as the parent of a child



Giving Birth to a Child



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Each pathway to establishing parentage results in parentage. Even though parentage arises as a matter of law under many of these doctrines, many parents who would be recognized by the law of their home jurisdiction as parents nonetheless have their parentage affirmed by a court order or judgment. Most do this to allay concerns about interstate recognition of parentage, given that an adoption or parentage judgment from one state must be given Full Faith and Credit by another state under the U.S. Constitution.

Uncertainty About Family Recognition Takes a Toll on Families

Raising a child is hard work and can be stressful. For families for whom barriers exist to establishing parentage, this unnecessarily adds to the stress of parenting and can take a toll on parents and children.

Many LGBTQ families report worrying about traveling with their children and having copies of paperwork such as birth certificates or adoption decrees to “prove” their legal relationship to their children. Without this paperwork, parents may be questioned about their relationship to their child when boarding a plane or getting emergency medical care.

Families frequently move and may need to move to a different state to be closer to family, for a new job, or to try someplace new. Given the current patchwork of parentage laws, parents may worry that their legal relationship to their child will not be recognized. This is one reason why legal advocates encourage all families to obtain some type of court judgment as additional security if they are able. The U.S. Constitution requires that state courts recognize the judgments from other states. Thus, if a family completes an adoption or gets a judgment of parentage or signs a valid voluntary acknowledgment of parentage and then moves to a different state, that legal parent-child relationship must be recognized.

Mom’s Marital Presumption Stripped by Trial Court Because of Outdated Parentage Statutes

Kris Williams and her wife Rebekah found a sperm donor on a website, and her wife, Rebekah, got pregnant through assisted reproduction. The couple married before their son was born in August 2019. As so many do, the couple agreed that the sperm donor was not intended to be a parent but would be able to know their child. Born into their marriage, their son’s birth certificate reflected both Kris and Rebekah as parents.

Two years later, the couple split and Rebekah sought to bar Kris from seeing the couple’s son.

An Oklahoma County District Court stated that the marital presumption did not apply, and, because Kris had not adopted her son, she was not his legal parent. The trial court judge concluded that the state’s parentage laws, which hadn’t been explicitly updated post-marriage equality, did not protect same-sex couples so that the marital presumption did not protect this child. The trial court stripped Kris of her marital presumption and allowed the sperm donor’s action to establish parentage to proceed, establishing him as the child’s second legal parent.

Adapted from: [Oklahoma custody battle could set new precedent for LGBTQ+ marriage rights \(19thnews.org\)](#); [Oklahoma lesbian will appeal after parental rights were transferred to son’s sperm donor \(19thnews.org\)](#).

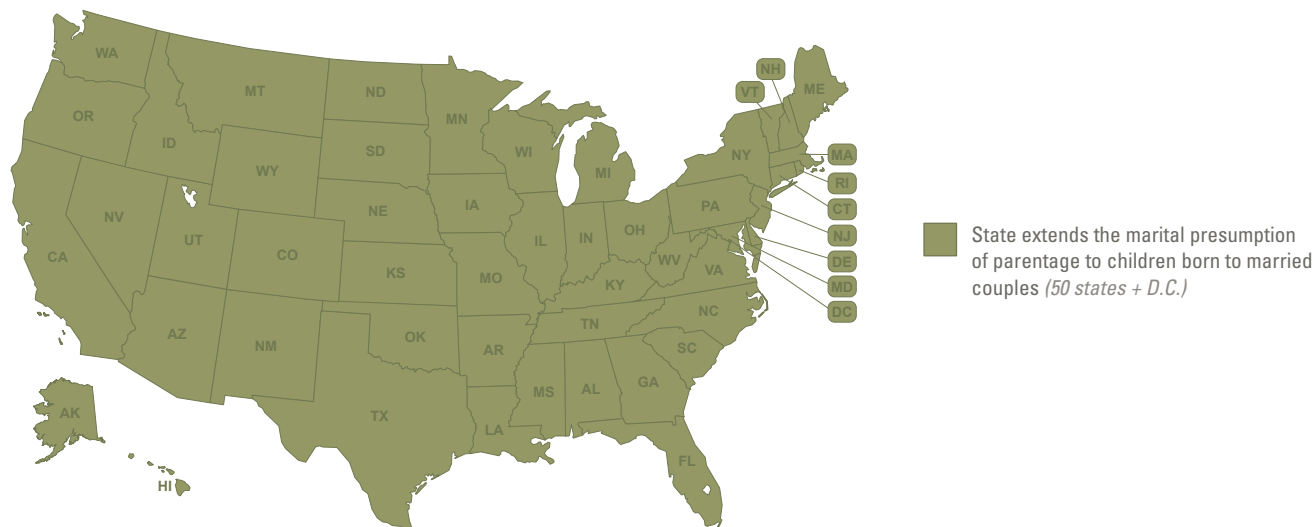
Current State Patchwork of Parentage Laws Leaves Some Children Unprotected

As noted above, not all states have adopted the 2017 Uniform Parentage Act, which offers a robust legal framework for establishing parentage for all children, regardless of who their parents are or how they were born.^e Rather, states vary greatly in their state parentage laws and related case law, particularly when it comes to the availability of straightforward, more affordable options for establishing parentage for children who are conceived using various types of assisted reproduction. While not a discussion of all paths to parentage, here we summarize a few important pathways and their availability as they relate to LGBTQ families.



Marital Presumption of Parentage. All states have a marital presumption of parentage, as shown in *Figure 4* on the following page. That is, when a married person gives birth to a child, the person’s spouse is treated as a parent of the child. In some cases, this presumption may be rebutted. For example, in some states, a spouse may rebut the presumption within a specific time period if another person is discovered to be the child’s biological parent and meets criteria set out in that state’s law for establishing parentage.

^e While not discussed in depth in this report, for families who may utilize intercourse as a form of family creation but where both parties do not intend to be parents, there are potential legal ramifications for the two people who had intercourse as well as for intended parents.

Figure 4: All States Extend the Marital Presumption of Parentage to Children Born to Married Couples, Including Same-Sex Couples

Source: Movement Advancement Project. "Equality Maps: Other Parental Recognition Laws." https://www.lgbtmap.org/equality-maps/other_parenting_laws. Accessed 05/01/2023.

Why it is Important to Seek Protection Beyond a Birth Certificate

Birth certificates are important documents that reflect a child's parentage. Often the first written documentation of a child's parents is the birth certificate, the information for which is completed at the hospital when a child is born. During a child's life—and even beyond—a birth certificate is often requested as proof of a parent's relationship with a child. This can include in situations like registering a child for school or health insurance or applying for a child's passport.

However, being listed on a birth certificate alone does not conclusively establish parentage. It is evidence of a parent-child relationship, but it does not take the place of one of the other pathways to establishing parentage. Given the bias and discrimination LGBTQ families still face, many families obtain a court judgment confirming parentage, which must be given full faith and credit and recognized across state lines.

As the U.S. Supreme Court has confirmed, states must apply the marital presumption of parentage equally to children of same-sex married couples.¹⁴ That is true

even if a state's statutes use gendered terms such as "husband" and "wife," which some states still have. For example, if states extend this marital presumption of parentage to a husband in a different-sex couple in which a wife is inseminated with donor sperm, then it must also recognize the same-sex spouse of a person who gives birth to a child conceived with donor sperm. Notably, the 2017 Uniform Parentage Act removes gendered language in its marital presumption of parentage to clarify that the marital presumption applies to any spouse of a person who gives birth, without regard to gender.

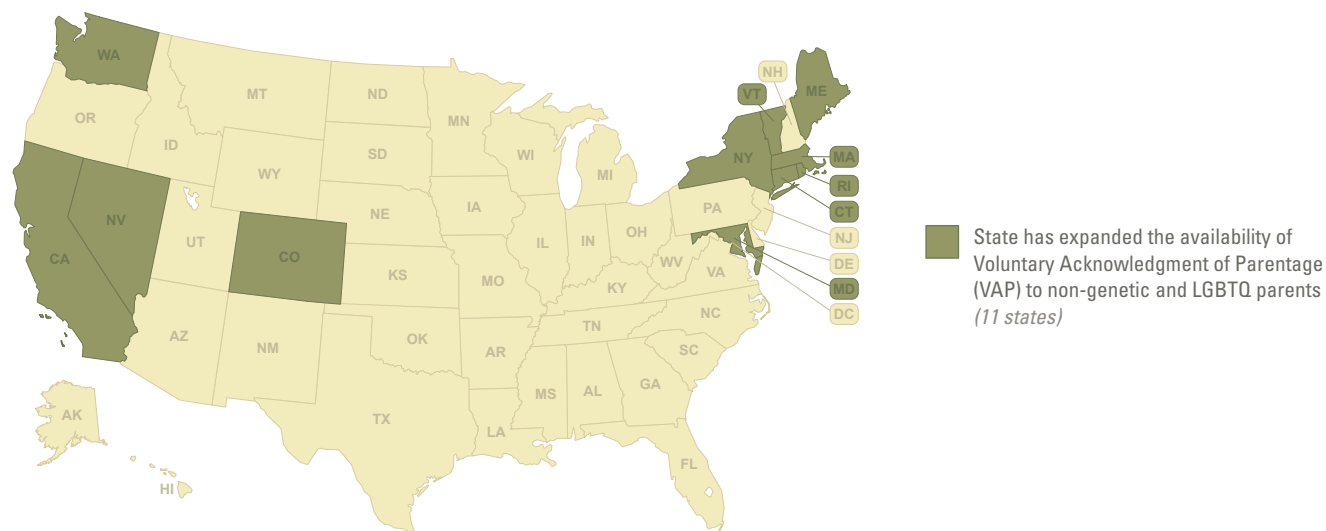


Voluntary Acknowledgment of Parentage. Of children born in 2020, 41% were born to unmarried parents.¹⁵ For most of these children, a mechanism called the "voluntary acknowledgment of parentage" (VAP) is used to establish parentage.

A VAP is most frequently completed at the hospital. There are no fees associated with it when signed at the hospital, and after a set amount of time—typically 60 days following signature—it takes effect and is the legal equivalent of a court decree of parentage and, under federal law, should be respected across state lines and in all jurisdictions. The federal government requires states to have this process because it quickly and easily establishes a legal parent-child relationship.

As shown in *Figure 5* on the next page, some states have expanded access to the VAP to ensure that non-genetic parents and LGBTQ parents, regardless of their

Figure 5: Eleven States Have Expanded the Availability of Voluntary Acknowledgment of Parentage (VAP) to Non-Genetic and LGBTQ Parents



Source: FAQ: Voluntary Acknowledgment of Parentage (VAP) - GLAD

Living Without Legal Protections Puts Family At Risk

Anna and her partner Sara are raising two children. After a 2.5 year long journey to become parents, Sara's eggs were fertilized by sperm from an anonymous donor and the resulting embryo was carried by Anna. When the couple left the hospital, Sara's name couldn't be listed on their first child Eli's birth certificate. As an unmarried couple, the state of Rhode Island didn't have a clear, simple pathway for Anna and Sara to both be legally recognized as Eli's parents.

"I am my son's parent. I have been since conception... I went to every single prenatal appointment. I was present for every minute of his 29-hour labor and delivery [and the time since] snuggling, feeding, changing, burping, and loving on him," Sara shared. Yet, because he was born to an unmarried family in a state lacking legal protections for all children born through assisted reproduction, Sara was a legal stranger to Eli.

The couple had to go through "second-parent" adoption proceedings whereby Sara would be named as Eli's legal parent. The process took eight months, during which Eli lacked a second legal parent and a legal connection to Sara. The process was expensive, exhausting, and humiliating – including a home study and notice to the anonymous sperm donor.

The family was a part of the effort in Rhode Island to modernize the state's parentage laws such that she and Anna could have both been recognized as legal parents immediately upon Eli's birth. "This is about protecting the kids. Families are families. They shouldn't have to be fighting in court to prove they are parents when they are the obvious but not the biological parents," Anna explained after the bill was passed. As a result of the Rhode Island Uniform Parentage Act, Anna and Sara were able to sign a voluntary acknowledgment of parentage (VAP) to protect their second child.

Adapted from: 'Equal parentage' bill is signed into law by governor (providencejournal.com); Sara and Anna - GLAD.

gender, can utilize the VAP to establish parentage as soon after birth as possible. Particularly important for families utilizing assisted reproduction such as donor sperm where one parent is not biologically related, the VAP can be completed upon birth at the hospital and without lengthy and costly court proceedings.



Confirmatory, Stepparent, and Co-parent/Second-Parent Adoptions. As noted above, some children join a family through adoption in which parental rights to families of origin have been terminated. This includes children who are adopted through private adoptions or through the child welfare system.

There are other instances where adoption is a tool not to establish a new relationship but to secure an existing relationship with a child they are parenting or planned for or to obtain a legal decree. These types of adoptions include *confirmatory adoption*, *stepparent adoption*, and *co-parent/second-parent adoption*. In all three instances, a legally recognized parent does not relinquish their parental rights, but another adult is additionally recognized as a legal parent.

In a **confirmatory adoption**, a parent obtains an adoption decree to confirm their legal relationship to a child, not to establish such a legal relationship. They may have established parentage through the marital presumption, the holding out presumption, or as someone who intended to parent a child born through assisted reproduction—but completing the confirmatory adoption results in an adoption decree. In the six states that have statutory provisions for confirmatory adoptions, as shown in *Figure 6* on the next page, the home study or background check requirements associated with other types of adoption are not required.

Stepparent adoption is available in every state to someone who is married to a child's legal parent. As a result of marriage equality, this type of adoption is available to same-sex married couples. Usually, the procedures for a stepparent adoption can be streamlined and simpler than for other types of adoptions and do not generally require a home study, though adoption laws vary by state. A married same-sex couple may use a stepparent adoption, for example, to gain parental rights for the parent who did not give birth to their child even though the parent adopting the child is recognized as a legal parent through the marital presumption.

A **co-parent or second-parent adoption** is available in some, but not all, states to parents regardless of marital status. These types of adoptions can be used to establish a legal relationship between a parent and a child OR to obtain an adoption decree for someone who is already a legal parent through another pathway to parentage, such as the marital presumption. In New Hampshire, for example, the second-parent provisions state that “an unmarried adult with the assent of at least one of the adoptee's parents and with the intention to share parenting responsibilities with one of the adoptee's parents” may adopt.¹⁶

Though the process varies by state, a second-parent adoption process typically looks more like the traditional adoption process. This means that the adoptive parent—even if they have been parenting the child since the child was born and may already have established parentage through another pathway—may have to be fingerprinted and undergo a background check, the family may be required to have a home visit, and a judge must evaluate the fitness of the parent to adopt their child. Second-parent adoptions can be costly, depending on the requirements in each state. In some states, the process for obtaining a co-parent or second-parent adoption may be more streamlined, however, this simplified process is not typically codified in statute as it is in the case of a confirmatory adoption. Due to these legal complexities, parents are encouraged to consult an adoption practitioner in their state.

Figure 6: All States Permit a Parent Married to A Child's Legal Parent to Petition for Stepparent Adoption, But Fewer Have Established Processes for Confirmatory Adoptions and Co-Parent/Second-Parent Adoptions

Figure 6a: Stepparent Adoption: Available in All States + D.C.

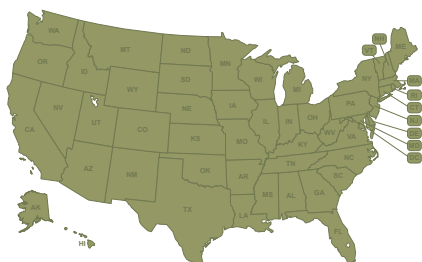


Figure 6b: Confirmatory Adoption: Available in Six States

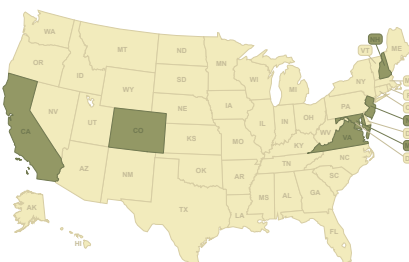
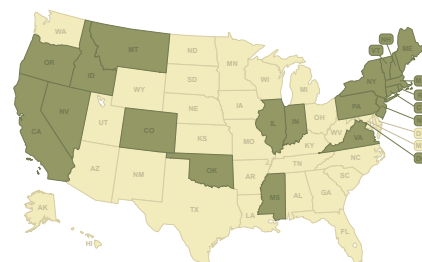


Figure 6c: Co-Parent/Second-Parent Adoption: 20 States + D.C.



Source: Movement Advancement Project. "Equality Maps: Foster and Adoption Laws." https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws. Accessed 05/01/2023

The Economic Realities for Many LGBTQ Families & The Costs of Establishing Parentage

When some LGBTQ people seek to become parents, they must navigate complicated parentage laws that vary based on where they live. Sometimes families seek legal advice or retain an attorney as they are starting to plan.

Because of the ways in which courts have misinterpreted parentage statutes in the case of LGBTQ parents, and that families sometimes move from one state to another where state laws vary for recognizing and establishing parentage, legal experts recommend parents seek legal judgments such as those available through adoption or a court order. Doing so provides an adoption decree or parentage judgment, which are well understood and are recognized by courts across the country and even when people move. In a 2022 survey of LGBTQ+ parents, four in ten parents reported having out-of-pocket legal costs related to family formation, including 28% of LGBTQ+ parents spending at least \$1,000 and 20% spending \$5,000 or more on legal costs.¹⁷

Unfortunately, adoptions can be expensive. Co-parent/second-parent adoptions are generally less expensive than a domestic or international adoption of a child whose parental rights are terminated entirely. Co-parent adoptions generally cost \$250-\$3,000. In states that have streamlined the adoption process specifically for second parents or stepparent adoptions, the home study requirement, for example, can be waived, saving as much as \$4,500, the cost of a second-parent adoption home study in California. If forms can be filed without an attorney, a family can save an average of \$1,000.¹⁸

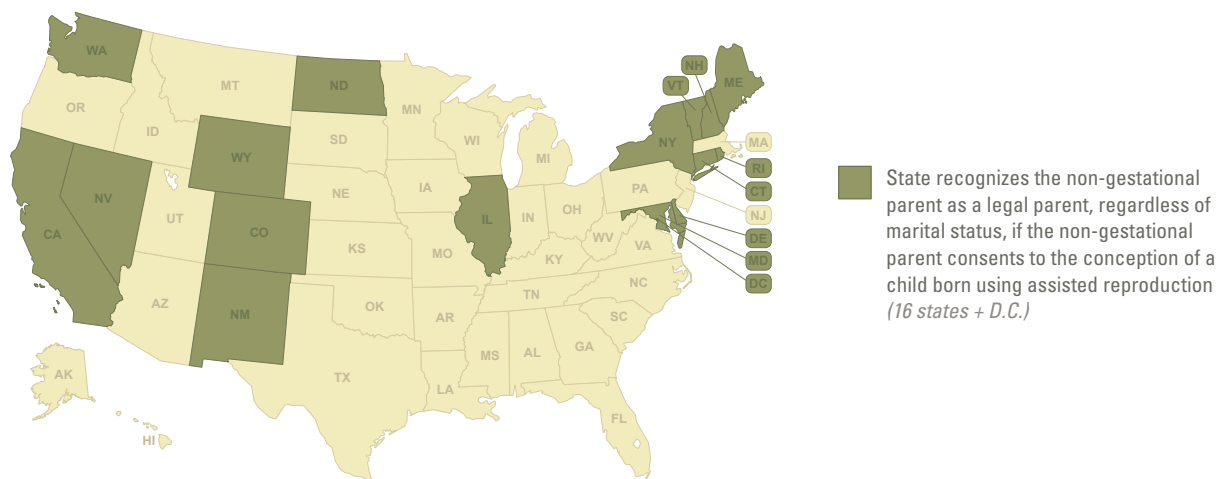
As states update their Voluntary Acknowledgment of Parentage process to be inclusive of children born through assisted reproduction, including to LGBTQ families, this can provide an important and financially accessible vehicle for parentage establishment. As discussed on page 7, the VAP is a no-cost or low-cost option for establishing parentage. Parents can sign a VAP in the hospital when their child is born in order to establish parentage. The fee for signing a VAP is usually under \$30 and is free if completed at the hospital. As discussed on page 7, some states have opened this affordable option to more families.

Creating Pathways to Establish Parentage Immediately Upon or After a Child is Born—An Important Protection for Children Born Through Assisted Reproduction

Some states are looking to put in place options that allow families to establish parentage immediately upon or shortly after the birth of a child.

Consent-to-Assisted Reproduction/Intended Parent Provisions. Most states have statutes specifically governing the parentage of children born through assisted reproduction. In most states, though, these statutes address only children born to married couples. Increasingly, however, states are adopting expanded assisted reproduction statutes that apply regardless of the marital status of the intended parents. One such model is the UPA (2017). The 2017 UPA model language states, “an individual who consents... to assisted reproduction by a woman with the intent to be the parent of a child conceived by the assisted reproduction is a parent of the child.” Under the UPA (2017), the consent can be, but need not be, in writing. Where the consent is in writing, it must be signed by both the birth parent and the other intended parent. Inclusive assisted reproduction provisions protect children by ensuring that the child has a legal parent-child relationship with both of their parents. As shown in *Figure 7*, to date, 16 states and the District of Columbia have processes by which all intended parents, regardless of marital status, can be recognized as legal parents if they consent to the assisted reproduction with the intention of parenting the child. This creates safeguards for the entire family in states that offer such protections.

Figure 7: A Minority of States Have Assisted Reproduction Statutes That Apply Equally, Without Regard to the Marital Status of the Intended Parents



Note: This map reflects states with assisted reproductive statutes that do not necessarily address surrogacy. Some states, like New Jersey, have inclusive surrogacy statutes, but not inclusive assisted reproductive statutes.

Source: Movement Advancement Project. “Equality Maps: Other Parental Recognition Laws.” https://www.lgbtmap.org/equality-maps/other_parenting_laws. Accessed 05/01/2023.

Inclusive Surrogacy Rules. Surrogacy laws vary across the country, ranging from states that provide detailed guidance about the parentage of children born through surrogacy to states that have no statutes governing surrogacy to one state that highly restricts surrogacy.¹⁹ For example, in Louisiana, only married couples may enter into a gestational surrogacy contract, the embryo must be conceived using sperm and egg from the intended (married) parents, and the person acting as the gestational surrogate cannot be compensated.²⁰

In the past few years, a number of states have updated their laws to better protect all of the participants in the process—including the child, intended parents, and people acting as a carrier or surrogate. These statutes allow for the establishment of the parentage of intended parents of children born through surrogacy, regardless of the marital status or genetic connection of those intended parents. These laws also include provisions to ensure that people acting as surrogates are protected, such as requiring that the intended parents pay for pregnancy-related healthcare and ensuring the person carrying the pregnancy gets to make all health and welfare decisions about themselves and the pregnancy.

The 2017 UPA outlines core components of what must be included in a surrogacy agreement, including that a person acting as a surrogate and their spouse or former spouse have no claim to parentage, and, rather, intended parents are the parents of the child upon birth pursuant to a compliant agreement.

Some families may seek the help of a genetic surrogate, in which the same person who carries the pregnancy also provides the egg to conceive a child. The UPA and a few jurisdictions regulate this type of surrogacy, including in ways that treat intended parents as the legal parents and protect the rights of the person acting as a surrogate during the pregnancy. Absent these provisions, families who grow their families through surrogacy may rely on the adoption process after the birth of a child to establish clear parentage of the intended parents.

Leaving Their Home and State to Create a Family

Since he was very young, Rolfe knew he wanted to be a dad. “Virtually every decision I’ve made in my life has been to enable me to be a good parent,” he says – for Rolfe that included becoming a lawyer so he could make a good living, and marrying Edward.

“Eddie had always thought kids wouldn’t be possible for him,” says Rolfe. “Then we met and talked a lot about it, and realized it was possible.”

They are now the happy, proud parents of Genie and Teddy. Genie is a cuddler and a big eater. Teddy is inquisitive and adventurous. They both love the neighbor’s dog. Eddie has become a stay-at-home dad and Rolfe took a less intense, 9-5 job so he can have plenty of family time.

Rolfe and Eddie became parents through surrogacy. They sought the help of a reputable surrogacy agency, because “it was important to us that our surrogate be respected, well-treated, and not compromised in any way.” They were matched with a woman in Utah who carried their children born through egg donation. A year and a half ago, Rolfe and Eddie flew to Utah when she went into labor to be present for the birth of their children.

Why Utah? Because Utah is a state where both men could be recognized as legal parents at birth and have their names on the birth certificate, providing Genie and Teddy with the security of a legal relationship with both of their dads. “We just couldn’t take the chance that our family would ever not be together,” says Rolfe.

In Rhode Island where the couple lives, dads like Rolfe and Eddie faced uncertainty because of a lack of statutory protections for children born through surrogacy.

With Rhode Island’s updating of their parentage laws, now couples in the state don’t need to leave to create their families and they can be legally protected as children and parent from the start.

Adapted from: [Rolfe and Edward - GLAD](#).

Transgender and Nonbinary Families

Families in which one or more parents identify as transgender or nonbinary may face additional challenges when it comes to securing legal ties to their children. Transgender parents may grow their families through adoption and assisted reproduction, or they may have children from other relationships. In these cases, transgender parents use the same costly workarounds as other LGBTQ couples to secure legal ties to their children. Some transgender parents can grow their families through intercourse. For example, a transgender man and transgender woman could have a child together, if the woman is able to contribute sperm and the man able to give birth.

Regardless of how they grow their families, transgender parents face unique challenges to securing and maintaining legal ties to their children. Parentage law is often written in accordance with the gender binary (man/woman), which may result in some transgender parents being misgendered on their children’s legal documents. For transgender people who have fought to be recognized correctly on legal documents such as their own birth certificate or government-issued I.D., being misgendered in parentage law is especially harmful. In states with gendered birth certificates, a transgender man who births a child may be required to be listed in the “mother” field. Similarly, a nonbinary person who contributed sperm to conceive a child may be forced to be listed in the “father” field and referred to as a “man.” The limited language on birth certificates in many states can create unnecessary barriers for transgender parents. Some states have recently adopted language to make their parentage statutes gender neutral, which is an important change for transgender parents.

At the Mercy of Chance

What happened to Moira and Hillary is the nightmare of every pregnant couple whose parental rights are not secured from the moment of birth. The couple had long planned to have a child and got married as soon as it was legally possible in the District of Columbia, near their Maryland home.

Moira got pregnant about a month after their wedding, and the couple went to a lawyer to jump-start a second-parent adoption process for Hillary. Things were going well until Moira hit the 27-week mark in her pregnancy.

"I was diagnosed with severe pre-eclampsia and put on hospital bed rest for two weeks," she recalls. "It was very intense." Matters became more frightening when doctors determined that baby June would need to come into the world by emergency C-section at just 29 weeks.

When June was born, she was rushed to the neonatal intensive care unit. "I saw her for one blurry second," said Moira, who then underwent an emergency hysterectomy and was incapacitated. In the meantime, Hillary had no standing as a parent. Her second-parent adoption would not be complete for three months and her name was not on the birth certificate.

"The staff kindly let Hillary into the NICU with June," says Moira. "I was out and couldn't give her permission to make medical decisions for June. "So the NICU team had to go ahead and do what they thought was best, which was to intubate her. To say it was incredibly stressful doesn't begin to describe it."

Hillary adds, "Had we been at a different hospital, or had we interacted with different staff, I might have been shut out entirely. Even though things worked out, parents like us should not be at the mercy of chance."

Adapted from: *Moira and Hillary* - GLAD.

Supports & Resources for LGBTQ Families and Their Children

As demonstrated throughout this report, many LGBTQ families navigate complicated, costly, and burdensome processes to ensure that children are legally connected to the people who parent them. Thankfully, there are many resources available to educate, support, and connect LGBTQ families and their children across the country, including:

COLAGE offers connection and community to youth and adults with LGBTQ parents. For example, they have affinity groups such as People with Trans Parents, Retro COLAGers to support people 40 and older with LGBTQ parents, and Adult COLAGers. Through these groups, as well as Family Week and Family Weekends, COLAGE offers people with LGBTQ+ parents opportunities to connect and to advocate for their families. www.colage.org

Family Equality focuses on advancing equity for LGBTQI+ families through advocacy, community, and education. They offer LGBTQ families opportunities to share their stories, connect through programming like Family Week and virtual events, get involved in advocacy to shape federal and state laws, and navigate building and protecting their families. www.familyequality.org

Both **GLAD** and **NCLR** provide critical legal advocacy and information for LGBTQ families.

GLAD leads impact litigation and legislative advocacy to shape laws to better reflect the needs of LGBTQ people and their families. Through its legal information line, GLAD Answers, GLAD also provides free and confidential legal information, assistance, and referrals to lawyers in the New England states. www.glad.org

NCLR works nationwide to litigate precedent-setting cases, advocates for legislative and policy change, and offers legal assistance through its information helpline, with particular focus on custody and parentage disputes, separation or divorce, transgender youth, and immigration and asylum. www.nclrights.org

OPPORTUNITIES FOR CHANGE

In a growing number of states, parentage laws are being updated to better reflect the realities of today's children and families, including LGBTQ families. This includes families formed using assisted reproduction, adoptive and blended families, and the ways in which people parent outside of marriage.

Recent Developments in the States

Several states have recently modernized their parentage laws, including Rhode Island, Connecticut, and Colorado.



In 2020, Rhode Island passed the Rhode Island Uniform Parentage Act, (RIUPA), which updated the state's 40-year-old parentage statutes to reflect the current Uniform Parentage Act language. The RIUPA comprehensively updated RI parentage law to ensure each child has a clear path to secure their legal parentage. The law allows LGBTQ couples access to establishing parentage through a simple civil Voluntary Acknowledgment of Parentage, ensuring LGBTQ couples are able to establish their parentage immediately at birth of their child. It also creates, for the first time in Rhode Island, an accessible path to parentage for children born through assisted reproduction, as well as protections for children born through surrogacy.



In 2021, Connecticut passed the Connecticut Parentage Act (CPA), which comprehensively updated Connecticut parentage laws to ensure that each child has a clear path to secure their legal parentage. For example, the CPA allows many LGBTQ parents to establish parentage through an Acknowledgment of Parentage, provides important clarity and protections for children born through assisted reproduction, and includes provisions for establishing parentage for children to nonbiological parents.



Colorado lawmakers took a more targeted approach in 2022 when "Marlo's Law" was passed. The law made three key updates to the state's parentage statutes. First, the new law states that courts may not require an in-person hearing, a home study, or fingerprinting or background checks for adoptions involving parents of children born using assisted reproduction. Second, it makes VAPs available to same-sex couples and unmarried couples using assisted reproduction. Third, the law ensures parentage provisions are gender inclusive.

Recommendations

State laws should recognize the diversity of families and have clear and financially accessible ways to establish parentage. If legislators remove outdated definitions and legal provisions about parental relationships and update laws to recognize current medical, legal, and cultural realities of what it means to be a parent, all children, regardless of the circumstances of their birth or the configuration of their families, would have a legal tie to the people who parent them.

What's needed are clear, equitable legal protections for all children and families, regardless of biology or marital status. The UPA offers statutory language that can provide a starting place for states. All revisions should hold the following core values:

- Recognize the diversity of families and ensure recognition of parents in children's lives. Regardless of the circumstances of their birth, children should be able to have secure legal ties to their parents. Specifically, state laws must offer pathways to parentage for children born through assisted reproduction and surrogacy.
- Improve access to protections through different mechanisms that consider cost, timing, and burdens on families. There should be clear ways to establish parentage as close to birth as possible and without engaging an attorney, spending additional money for court fees or home visits.
- Improving consistency from state to state so there isn't as much confusion for parents, potential parents, and attorneys working with families who move.
- Streamline and make less intensive and more affordable the process of adoption to secure children to their parents.
- Voluntary acknowledgments of parentage should be made available to secure more children in all states, so that parentage can be secured soon after birth.

CONCLUSION

In too many states, children still lack equitable ways to establish parentage. This results in uncertainty, confusion, and protracted disputes, which can take longer to resolve and may result in children being separated from a parent they know and love.

It is time for every state to establish clear, accessible ways for children and parents to establish legal ties to one another. All children, regardless of the circumstances of their birth or the gender, sexual orientation, or marital status of their parents, need secure legal ties to their parents.

ADDITIONAL INFORMATION AND FACT SHEETS

- [LGBTQ Paths to Parentage Security](#)
- [Frequently Asked Questions \(FAQ\): Voluntary Acknowledgment of Parentage \(VAP\) from GLAD](#)
- [GLAD Legal Helpline](#)
- [NCLR Legal Helpline](#)
- [Dobbs v. Jackson Women's Health Organization: What LGBTQ+ Families Need to Know](#) from COLAGE, Family Equality, GLAD, and NCLR

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ENDNOTES

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- ¹⁴ However, even with some remaining gendered statutes, the U.S. Supreme Court has stated that where married couples are offered certain protections under the law, they must be afforded to married same-sex couples as well. Thus, in 2017, following the refusal of the State of Arkansas to issue a birth certificate to a child born to a married same-sex couple listing both parents, the Court ruled that where the state issues birth certificates with both members of a married couple, they must do so for same-sex married couples as well.
- ¹⁵ Centers for Disease Control and Prevention, National Center for Health Statistics. "Unmarried Childbearing." January 31, 2023.
- ¹⁶ New Hampshire Revised Statutes, Title VII: Public Safety and Welfare, Chapter 170-B, Adoption, 170-B:4 Who May Adopt.
- ¹⁷ "The LGBTQ+ Economic and Financial (LEAF) Survey: Understanding the Financial Lives of LGBTQ+ People in the United States." March 2023. Center for LGBTQ Economic Advancement & Research (CLEAR) and Movement Advancement Project (MAP).
- ¹⁸ "Average Adoption Costs in the United States." Family Equality.
- ¹⁹ Joslin, Courtney G. "(Not) Just Surrogacy." 109 *California Law Review* 401 (2021).
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