

SAME SEX FAMILIES – A SERIES *Article No. 1: Children of Same Sex Couples*

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Now that the Commonwealth is recognizing and performing same sex marriages, many practitioners will begin meeting with clients and will be presented with issues surrounding same sex couples and families for the first time. This article series will seek to generally educate attorneys in the Commonwealth about the issues and about common pitfalls in practice.

Introduction

According to the 2010 U.S. Census³, more than 2,500 same-sex couples in Virginia are raising children together, with an average of 1.6 children under the age of 18 per household. In many respects, these families have gained significant protections and recognitions over the last year, not the least of which relate to Virginia's recognition of same-sex marriage beginning in October 2014. However, while the advent of same-sex marriage recognition has recently conferred numerous benefits and responsibilities upon those couples who have chosen to marry, same-sex couples (both married and unmarried) who are raising children in the Commonwealth are still vulnerable to numerous inequities, particularly in matters related to the legal parentage and custody of their children. This is because only one parent is generally considered the children's "legal" parent, regardless of whether the couple is married.

Historical Work-Arounds

The lack of same-sex households with two legally recognized parents results from a long history in the Commonwealth of restricting adoption based on marital status. In Virginia, only married couples or single individuals can adopt, meaning that any same-sex couple wishing to adopt could not jointly apply.⁴ Instead, one member of the couple would have to adopt as a single individual, and the other partner would thus remain a legal stranger. Same-sex "second parent" adoptions⁵, which would have allowed one partner to adopt the other partner's child without terminating the first partner's parental rights, had not occurred in Virginia prior to marriage recognition. In fact, unmarried couples in the Commonwealth are still not eligible to take advantage of "second parent" adoption. Although some couples were and are able to obtain joint custody orders, ensuring that both parties have custody rights, many courts refused (and continue to refuse) to grant⁶ or honor these orders, and they do not confer legal parental status. As a result—although many couples planned⁷ for, raised, and in every respect were both parents to their children—only one partner was generally deemed the child's legal parent.

Marital Presumption

This situation could be different for married same-sex couples in the future, since the "marital presumption" should arguably apply. The "marital presumption" means that one spouse is considered the presumptive legal parent of a child if the other spouse gives birth to or adopts the child, and the parties are married at the time of the child's birth or adoption.⁸ This should be true even if the married couple consists of two men, for example, and so one spouse is clearly not biologically related to the child. For couples who were legally married in another state before they had their children, or were legally married in Virginia (after October 6, 2014) before they had their children, the marital presumption arguably applies – meaning that both parents

1. See www.zavosjunckerlawgroup.com.

2. See www.rrbmdk.com.

3. See <http://williamsinstitute.law.ucla.edu/wp-content/uploads/VA-same-sex-couples-demo-apr-2014.pdf>.

4. Va. Code Ann. § 63.2-1225 (2014).

5. These are available in a variety of states, most significantly in Maryland and the District of Columbia. See D.C. Code § 16-312 (2014); *In re M.M.D.*, 662 A.2d 837 (D.C. 1995); Md. Estates and Trusts Code Ann. § 1-207 (2014); *In re Petition of D.L.G. & M.A.H.*, No. 95-179001/CAD, 2 MFLM Supp.21 (1997) (Cir. Ct. Balt. City, June 27, 1996).

6. The arguments against issuing these orders in the Juvenile and Domestic Relations District Courts of this Commonwealth are based upon the lack of actual case and controversy in so far as a Consent Joint Custody Order is being presented to the court for entry.

7. Standard family planning for same-sex families has historically included: (i) advanced estate planning, including reciprocal powers of attorney including those for children as well as designations of standby-guardians for children; (ii) co-parenting agreements; (iii) voluntary support agreements; and (iv) joint custody orders.

8. Va. Code Ann. § 63.2-1202(D) (also allowing the marital presumption to apply within 300 days of the termination of the marriage).

9. See Laura Kebede, *Lesbian Couple Wins Right to Have Names on Children's Birth Certificates*, RICHMOND TIMES-DISPATCH, JANUARY 25, 2015, [HTTP://WWW.RICHMOND.COM/NEWS/VIRGINIA/ARTICLE_DE7CFA92-72AA-5D19-835B-F87853B07A1A.HTML](http://www.richmond.com/news/virginia/article_de7cfa92-72aa-5d19-835b-f87853b07a1a.html).

should be named on the birth certificate.⁹ The obvious problem with both parties to a same sex marriage merely having a birth certificate to identify their status as legal parents relates to portability and the inability to have a jurisdiction recognize their status as a legal parent absent a judgment from a court of competent jurisdiction. This issue has not yet been litigated to the knowledge of the authors of this article.

Notwithstanding the foregoing, Virginia's marital presumption if applied to same sex families, only provides limited protection for same-sex couples - for one thing, the law still only mentions a husband and wife¹⁰, as does much of Virginia's Code. As a result, until the law is updated to include gender neutral terms,¹¹ couples cannot definitively rely on the marital presumption to ensure that they will both be considered legal parents to their children born during their marriage. In addition, such a reliance by same-sex couples would be dangerous and short cited given that the marital presumption will not be honored in jurisdictions which do not recognize same-sex marriage, and parents may risk losing the rights and responsibilities of parenthood simply by crossing state lines. A birth certificate is not a court order and thus not afforded full faith and credit in portability situations, such as crossing state lines. Further, marrying after having children will not automatically confer legal parenthood on both parents, so same-sex couples who already had children before marriage will still be seen as having one "legal" and one "non-legal" parent under the law of this Commonwealth even after marriage.

Problem Areas

These issues surrounding legal parentage are important enough while the couple remains together: a parent's "legal" status may impact the ability to make health care or other decisions for a child in an emergency, the child's eligibility for certain benefits (such as health insurance or Social Security), a parent or child's inheritance rights, and numerous other protections. However, these issues become magnified if a same-sex couple raising children later decides to break up or get divorced. As may be evident, if only one parent is considered the "legal" parent of the child, that parent is endowed with all of the constitutional protections of parenthood, including deciding who gets custody and/or visitation with that child; the other parent has no such protections. This becomes incredibly important if a same-sex couple splits up; one parent could, in effect, deny the other (non-"legal") parent any access to their mutual child. Although the Commonwealth now recognizes same-sex marriage, even if the parties are married, the non-"legal" spouse will be considered a mere step-parent with no automatic rights as to custody or visitation.¹² In the same vein, the non-"legal" spouse will not be liable for child support, as the children will not be considered legally theirs to support.¹³

Third Parties and Step-Parents with Legitimate Interests

As a third party, a non-"legal" parent can still petition the court for custody or visitation; however, the standard is incredibly high and difficult to meet. In Virginia, a third party who the court determines has a "legitimate interest" may petition for court-ordered visitation and/or custody of a child under Va. Code §20-124.1 and §20-124.2.B, and the court may award such visitation and/or custody upon a showing by clear and convincing evidence that the best interest of the child would be served thereby. However, if the child's legal parent objects to non-parental visitation, a trial court will hold off on applying the "best interests" standard and will instead defer to the legal parent's preference unless and until the third party petitioner has shown that actual harm to the child will result if visitation and/or custody are not awarded.¹⁴ This actual harm must be proven by clear and convincing evidence.¹⁵

Virginia courts have generally been reluctant to find "actual harm" in these situations. In *Stadter v. Siperko*,¹⁶ two women were involved in a cohabiting lesbian relationship and agreed to have a child through artificial insemination of the biological mother. The parties shared prenatal responsibilities and expenses throughout the pregnancy, and shared parenting responsibilities after the birth of the child. The partner did not legally adopt the child, nor did the parties enter into any agreement concerning the partner's parental rights. When the parties later separated, even though both women had planned for and raised the child in question since birth, the biological mother was considered the sole legal parent of the child. Initially, the partner was awarded

⁹ Va. Code Ann. § 63.2-1202(D).

¹⁰ Numerous bills have been proposed in the Virginia State General Assembly to update gender-specific language in the Code of Virginia, in response to the state's recognition of same-sex marriage. See S.B. 1211, General Assembly, 1st Session (2015); H.J. 546, General Assembly, 1st Session (2015); H.B. 1600, General Assembly, 1st Session (2015).

¹¹ See VA Code Ann. § 20-124.1.

¹² See *Russell v. Russell*, 35 Va. App. 360 (Va. Ct. App. 2001).

¹³ See *Williams v. Williams*, 256 Va. 19, 501 S.E.2d 417 (1998); *Stadter v. Siperko*, 52 Va. App. 81, 661 S.E.2d 494 (2008).

¹⁴ See *Griffin v. Griffin*, 41 Va. App. 77, 581 S.E.2d 899, 2003 Va. App. LEXIS 337 (2003).

¹⁵ 52 Va. App. 81, 661 S.E.2d 494 (2008).

¹⁶ See *Griffin*, 41 Va. App. at 85 (citing *Williams*, 24 Va. App. at 784-85, 485 S.E.2d at 654) (emphasis added).

temporary, supervised visitation by the juvenile and domestic relations district court, but upon appeal, the circuit court found that, although the partner was “a party with a legitimate interest” in the child, she had failed to prove by clear and convincing evidence that the child would suffer actual harm if visitation were not awarded. In subsequent cases, the courts have solidified their reluctance to find “actual harm,” stating in one such case that, “[T]he evidence must establish more than the obvious observation that the child would benefit from the continuing emotional attachment with the non-parent. No doubt losing such a relationship would cause some measure of sadness and a sense of loss which, in theory, “could be” emotionally harmful. But that is not what we meant by “actual harm to the child’s health or welfare.”¹⁷

Absent a showing of such “actual harm,” third party visitation will be denied, even if the “third party” has been the child’s parent for all intents and purposes for his or her entire life. Although some jurisdictions will recognize such third parties as “de facto” parents, Virginia has declined to recognize any such a status.¹⁸ For same-sex couples raising children in Virginia, this means that the non-“legal” parent can, for all intents and purposes, lose all access to their children if the “legal” parent so determines.

Practical Application for Attorneys

Given the incredible importance of the status of being a “legal parent,” when meeting with same-sex couples raising children in Virginia practitioners should discuss with their clients the importance of taking any and all steps to ensure legal parentage for both parties. If the couple is married, Virginia will now grant them a step-parent adoption.¹⁹ However, if they are unmarried, precious few avenues currently exist for same-sex couples; while the couple could file for a joint custody order, there is no guarantee that a court will grant it, and custody is still not the equivalent to legal parentage.

Parental Placement Adoption for Non-Biological Children

For persons adopting a non-biological child to whom neither parent is a biological parent, or in the event one parent is a biological parent, but is not proceeding with a “Step-Parent” adoption, the court requires an adoption pursuant to Va. Code §63.2-1201.²⁰ An adoption not done through a board, licensed child placing agency or by step-parent adoption is considered a Parental Placement Adoption. An adoption under Va. Code §63.2-1201 can be filed by any natural person who had a child placed by a child-placing of the Commonwealth, who has consent by birth parents pursuant to Va. Code §63.2-1233 or who is a party to a surrogacy contract. Additionally, married or previously married persons can also adopt children through this type of petition with the consent of the biological parent.

An adoption when not done through a child-placing agency or board of the Commonwealth requires the consent of the biological parents, unless consent is unobtainable, or determined to be withheld against the best interest of the minor child.²¹ Additionally, for an adoption by a board or licensed agency there must be an investigation prior to placement by a local board or licensed agency. In the case of a parental placement adoption instead of an investigation there is a “home study”,²² unless the adopting petitioner is currently or previously married to the biological parent, in which case the court in its discretion may waive the requirement. The investigation must identify if the home and adoptive parent is appropriate for such an adoption, whether the petitioner is financially capable of caring for the child, mental and physical fitness, as well as, moral suitability.²³ There will also in most cases be an appointment of a Guardian Ad Litem for the minor child who will represent the best interest of the child in the adoption matter.²⁴

Parental Placement Adoptions for Same Sex Couples

On October 10, 2014 Governor McAuliffe issued a bulletin to all local Directors of Social Services which states that, “Any married couple is a married couple for purposes of adoptive placements in accordance with Virginia Code § 63.2-1225.”²⁵ While this is a significant step to allowing same-sex couple to legally adopt in a way that both parents are legal, adoptive parents, this bulletin

¹⁷. See Stadter, 52 Va. App. at 91.

¹⁸. Va. Code Ann. § 63.2-1202(D). Your authors have been successful in getting these step-parent adoption orders entered all over the Commonwealth.

¹⁹. See VA Code Ann. § 63.2-1201

²⁰. See VA Code Ann. § 63.2-1233

²¹. Similar to an investigation in most all aspects.

²². See VA Code Ann. § 63.2-1208

²³. See VA Code Ann. § 63.2-1237

²⁴. See Margaret Ross Schultz, *Impact of Same-Sex Court Ruling on Adoption and Foster Care*, October 10, 2014, <https://governor.virginia.gov/newsroom/newsarticle?articleId=6827>.

²⁵. See VA Code Ann. § 63.2-1225 Determination of an appropriate home for a child to be adopted.

is to be followed by state social service agencies only and does not change the above Virginia Code sections.²⁶ It is unclear what weight this bulletin carries in jurisdictions across the Commonwealth and what weight a court would give the document. Additionally, this bulletin only applies to adoptions for children who have been properly committed or entrusted to a local board or licensed placement agency.²⁷

Problem Areas

Although some of the gender language of this statute is neutral, the following language presents a problem for married same-sex couples wishing to adopt through a Parental Placement adoption, "In the case of married persons, or persons who were previously married who are permitted to adopt a child under § 63.2-1201.1, the petition shall be the joint petition of the husband and wife or former spouses but, in the event the child to be adopted is legally the child by birth or adoption of one of the petitioners, such petitioner shall unite in the petition for the purpose of indicating consent to the prayer thereof only." This language was not changed by the bulletin issued by Governor McAuliffe, as the bulletin only applies to agency and board adoptions. The authors of this article are unaware of any controlling case law on this issue.²⁸ Further, for same-sex couples previously married, Virginia Code §63.2-1201.1, which applies to previously married parents standing in loco parentis, strictly prohibits the adoption under that code section as it states a child may only have two adoptive parents, one father and one mother.

Even if the statute were interpreted to include same-sex parents, there is also the issue that same-sex parents could face discrimination by third parties involved in the proceeding or completing the investigation in the case of placement by a board or licensed agency. Religious agencies placing children can decline placements based on a conscience clause, enacted in 2012.²⁹ Even if the couple is not using a religious agency for the adoption the investigation must determine among other things if a parent is "morally suitable" to adopt a child. This gives discretion to the investigating parties as to what they consider "morally suitable." And the same language is included in the requirements for a home study for a parental placement adoption, again giving third parties discretion in the results of a home study. There has been no controlling case law to your authors knowledge explicitly stating that same-sex couples cannot be defined as not "morally suitable" to adopt a child solely based on their marital or gender status. This gives the court wide discretion in terms of approving or disapproving an adoption based on the results of a home study or investigation. If the investigation is done by a local department of social services it should take into consideration the aforementioned bulletin stating that they should not specifically object on that basis;¹ however, there is no controlling law regarding the issue.

Practical Application for Attorneys

When meeting with same-sex couples raising children in Virginia practitioners should discuss with their clients the different types of adoption methods and the current law on each type of adoption. If the couple is adopting through a local Department of Social Services they should be able to successfully adopt a child with both spouses being considered "legal" parents. However, if they are using a child placement agency, foreign agency or using the parental placement method, there is no guarantee that a court will grant it the adoption.

Conclusion

Legal parentage is one of the most important rights for same-sex couples to ensure their children get the legal and financial benefits of those conveyed to children of same-sex couples, and that both parents have legal rights of custody, visitation and child support. There is still significant confusion since October 2014 over the rights of same-sex couples regarding legal custody and adoption of children. The state of the current wording of legislation on the issue and question as the legal meaning of the bulletin issued by Governor McAuliffe is ripe for change either by the legislature or judiciary. Many local jurisdictions in the absence of action by the legislature to date have interpreted the meaning of the current laws in various ways making this a difficult area for practitioners to advise their clients. It is important for attorneys representing same-sex clients to continually check for updated laws and case law updates and to follow the best practices to try to ensure legal parentage to both parties, if possible during marriage.

²⁶. See VA Code Ann. § 63.2-1221

²⁷. Your authors are currently litigating issues of whether a minor child can have two adoptive parents of the same sex in jurisdictions in Northern Virginia.

²⁸. See VA Code Ann. § 63.2-1709.3

²⁹. See Margaret Ross Schultz, *Impact of Same-Sex Court Ruling on Adoption and Foster Care*, October 10, 2014, <https://governor.virginia.gov/newsroom/newsarticle?articleId=6827>.