Issue Spotting for LGBT Parents in Child Welfare Proceedings

• If the parent has a same-sex or trans partner, has that partner done a second parent adoption or obtained a parentage judgment?
  o Married same sex couples can use stepparent adoption procedures available to all married couples.
  o Unmarried couples may have obtained a second parent adoption. A number of states allow second parent adoptions.
  o If there is an adoption, the adoptive parent is a legal parent and is entitled to all the same rights and benefits as the biological parent.

• Is the parent married?
  o If yes, state parentage presumptions and/or ART statutes may apply to protect the rights of same-sex or trans spouse.
  o Every state has a marital presumption of parentage. A spouse is presumed to be the parent of a child born to the marriage.
    ▪ Although the marital presumption of parentage should apply equally to same-sex spouses, not all states have case law adjudicating that issue.

• If unmarried, does the state have a holding out provision in the family code?
  o If yes, holding out provision may protect the rights of same-sex or trans partner.
  o Holding out provisions generally state that if a person has held a child out as their own (sometimes for a specific period of time) they are presumed to be the parent of that child regardless of biological connection. A handful of states have codified holding out provisions.

• If unmarried, does the state recognize parent-like rights for unmarried same-sex or trans partner?
  o Many states have case law stating that an individual who plays a parent-like role in a child’s life should have standing to seek custody or visitation of the child.
    ▪ Sometimes called de facto parent doctrine, equitable parent doctrine, in loco parentis, psychological parent doctrine.
  o If the state recognizes de facto parents, the parent may be able to file a petition for custody or visitation of the child.
• If unmarried, do the parents have a parenting agreement?
  o If yes, some states may recognize this agreement as giving rights to the non-
    biological parent for custody and/or visitation.
  o Examples: Eldredge v. Taylor, 339 P.3d 888 (Okla. 2014); Frazier v. Goudschaal,
  o If there is an agreement, attorney can file a petition to have the court recognize the
    agreement and grant standing to seek custody or visitation stemming from the
    agreement.

• Can the child be placed with the same sex or trans partner under the state dependency
  code’s definition of kinship care or fictive kin?
  o Some states allow children to be placed with non-relatives under a definition of
    kinship care or fictive kin.
    unrelated to the child . . . but has a close emotional relationship with the child that
    he or she may be considered part of the family”); Ky. Stat. § 600.020(28); Ark.
The Changing Face of Family Law

Living Apart Together as a “Family Form” Among Persons of Retirement Age: The Appropriate Family Law Response
Cynthia Grant Bowman

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The Golden Years, Gray Divorce, Pink Caretaking, and Green Money
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Neglected Lesbian Mothers
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Howard C. Schwab Memorial Essays, 2017 & 2018


In the Case of Biology v. Psychology: Where Did My “Parent” Go?, Michelle M. Gros (2017)


Family Drug Courts: Combatting the Opioid Epidemic, Stephanie Tabashneck (2018)


Neglected Lesbian Mothers

NANCY D. POLIKOFF*

Introduction

In June of 2013, Hilda left her two-year-old and ten-month-old children with her partner Joanne while she went to work.¹ Joanne injured the two-year-old, Robert, and both children were removed by the Kansas Department for Children and Families (DCF).² After a short stay in foster care, the children were placed with Hilda’s mother and her husband.³ The family reunification efforts were provided by St. Francis Community Services, a faith-based agency under contract with the state.⁴ Hilda testified, and there was no denial by the agency, that a case worker asked her if she would ever go back to “loving a man” and told her she needed to be “fixed” so that she did not pass her same-sex “preference” on to

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² Id. at *5, *6.
³ Id. at *6. (The names of the family members are not contained in the opinion and have been selected for ease of reference).
her children.\textsuperscript{5} Hilda complained about the agency bias.\textsuperscript{6} Two years later, the trial court terminated Hilda’s parental rights.\textsuperscript{7} The appellate court, upholding the termination, made no reference in its opinion to Hilda’s testimony about what agency personnel said to her regarding her sexual orientation and rejected her argument that the agency website indicated that it was imposing its Christian religious principles upon her.\textsuperscript{8}

Hailey and Jane met in a homeless shelter in Wichita, Kansas, and soon after moved into a trailer with their children, including Hailey’s six-year-old son, Jayden.\textsuperscript{9} Jayden always thought of himself as a girl.\textsuperscript{10} She named herself Hannah at age five and wore nail polish to school in the second grade.\textsuperscript{11} Hailey and Jane had never heard the word “transgender,” but they found an LGBT-positive church, where they took Hannah and where she could be herself.\textsuperscript{12} Meanwhile, one of Jane’s children, Bryan, was showing signs of serious mental health problems.\textsuperscript{13} Jane wanted help for him and, without access to private resources, she called the state social service agency to try to get him treatment.\textsuperscript{14} Bryan complained to the social worker about his mothers and said, among other things, that they encouraged his brother to wear dresses.\textsuperscript{15} The social worker interviewed Jayden at school and immediately took the child into state care.\textsuperscript{16} The paperwork presented to the court said that Jayden’s mother had a female partner and that therefore, he was subject to “more confusion and social difficulties than other children.”\textsuperscript{17} The judge ruled that Jayden should be

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\textsuperscript{5} Id. at 2, 3.

\textsuperscript{6} Hilda filed a petition for habeus corpus alleging that the state was preventing her from seeing her children because she was in a same-sex relationship. The trial court dissolved the writ as premature, a decision that was upheld by the Kansas Court of Appeals. \textit{In re R.M.}, No. 114,004, 2016 LEXIS 132, at *3, *4 (Kan. Ct. App. Feb 19, 2016).


\textsuperscript{8} Id. The written opinion in this case contains information that could be sufficient to justify the trial court’s rulings. The mother’s claims of sexual orientation bias, however, were not adequately developed and addressed, and it is therefore impossible to determine if such bias played a role in her loss of parental rights.

\textsuperscript{9} \textsc{Andrew Solomon}, \textsc{Far From the Tree}: \textsc{Parents, Children, and the Search for Identity} 646, 647 (2012).

\textsuperscript{10} Id. at 646.

\textsuperscript{11} Id. at 646–47.

\textsuperscript{12} Id. at 647.

\textsuperscript{13} Id. at 648.

\textsuperscript{14} Id.

\textsuperscript{15} Id.

\textsuperscript{16} Id.

\textsuperscript{17} Id.
\end{flushleft}
placed in a foster home with “healthy parents.”\textsuperscript{18} The state social worker repeatedly said, “[w]e’re not giving this child back to lesbians.”\textsuperscript{19}

In Fairbanks, Alaska, in 2011, Gloria and Alice decided to start a family. Same-sex marriage was not yet legal in the state. Gloria gave birth to Kate in 2012 and to Anthony in 2013. Gloria worked outside the home and Alice was the children’s primary caregiver. The Office of Child Services became involved with the family in response to concerns about Alice’s physical discipline of the children and removed them in May 2014.\textsuperscript{20} The petition named only Gloria as a parent. Gloria’s court-appointed counsel argued that Alice should be made a party and appointed her own lawyer. Alice filed a \textit{pro se} motion to that effect as well. The judge refused. The couple married a few months later and Alice filed a second motion, which was again denied. Alice and Gloria obtained new birth certificates for their children naming both of them as parents pursuant to a regulation permitting such an action for newly married lesbian couples who could show they were together when their children were born. Alice filed another motion, as well as a motion to intervene, and again those were denied. Gloria at all times supported Alice’s motions. Two years later, Gloria’s parental rights were terminated after a trial from which Alice was largely excluded.\textsuperscript{21}

Jann and Jamie made a decision to raise a child.\textsuperscript{22} They chose Jamie to bear the child based on health concerns.\textsuperscript{23} When Jerome was two months old, the couple married.\textsuperscript{24} After they split up, Jann filed a petition for joint custody.\textsuperscript{25} The court found that Jann had no standing under New York law to claim custody or visitation rights.\textsuperscript{26} Jamie later moved in with a boyfriend. When Jerome was just under three, he showed up to daycare with red marks and bruising consistent with being slapped hard on both

\begin{itemize}
  \item \textsuperscript{18} Id.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} The facts and procedural history of this case are found in the mother’s brief to the Alaska Supreme Court. Opening Brief of Appellant, G.W. v. Alaska, No. S-16516 (Mar. 16, 2017) (unreported; on file with author).
  \item \textsuperscript{21} After G.W. filed her brief in the Alaska Supreme Court, the state stipulated that the trial court’s failure to recognize Alice as a parent was an error, and the parties stipulated to vacating the termination of Gloria’s parental rights and remanding for proceedings in which Alice would also be treated as a parent. Stipulation to Remand, G.W. v. Alaska, No. S-16516 (Alaska Sup. Ct., Apr. 28, 2017, (unreported; on file with author).
  \item \textsuperscript{23} Id. at 3.
  \item \textsuperscript{24} Id. at 4. This is a fictional name.
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} Paczkowski v. Paczkowski, 128 A.D.3d 968, 968 (N.Y. App. Div. 2015).
\end{itemize}
sides of his face. After an investigation, child protective services removed the child and placed him in foster care. The agency refused to allow Jann to visit Jerome.27

These are the stories of lesbian mothers. They are not the lesbian mothers whose narratives occupy most legal scholarship, public policy advocacy, test case litigation, or media portrayals of same-sex couples raising children. They are mothers with same-sex partners whose children have been removed by the child welfare system. Only one study of mothers who lost custody of their children to the state has asked about sexual orientation, and that study found that the mothers who identified as lesbian or bisexual were four times more likely than those who identified as heterosexual to suffer such loss.28

Research and advocacy concerning same-sex families has largely ignored the distinctive needs of this set of parents. For that reason, I call them neglected lesbian mothers. In Part I of this article, I document the existence of this population. I use case law examples; the small amount of existing research; the demographic data demonstrating convergence of lesbians most likely to be mothers with mothers most likely to have children removed; and data establishing that sexual minority parents disproportionately experience risk factors associated with increased likelihood of child welfare system involvement. In Part II, I comment on the invisibility of this group and the missed opportunities for research to learn more about them. I speculate that the visibility in marriage equality advocacy of practically perfect same-sex couples—often raising adopted children—has exacerbated the inability to see the lesbian mothers whose children wind up in state care and sometimes available for adoption. In addition, advocates often defend against attacks on LGBT parenting by emphasizing the number of children in state care who need permanent homes. This argument comes at the expense of acknowledging the racial and economic injustice of the child welfare system that results in the removal of too many children from their parents, including LGBT parents. In Part III, I describe the distinctive legal issues this constituency faces, including discrimination, especially at the hands of faith-based agencies; failure to properly ascribe parentage to a nonbiological same-sex parent; and failure to include a partner or former partner who is not a parent

27. Leland, supra note 22.
28. Kathi L.H. Harp & Carrie B. Oser, Factors Associated with Two Types of Child Custody Loss Among a Sample of African American Mothers: A Novel Approach, 60 SOC. SCI. RES. 283-96 (2016)(hereinafter Harp & Oser). The finding was statistically significant with a $p$ value of $<0.001$. 
within the categories of relatives and family members that take on special meaning in the child welfare context. I conclude in Part IV with a call for litigation, legislative and administrative advocacy, and education, all of which have a role to play in assuring justice for LGBT parents at risk of losing custody of their children to the state or suffering involuntary termination of parental rights.

I. Lesbian Mothers in the Child Welfare System

Naturally, the stories I began with constitute evidence that this group exists, and many more stories emerge from cases in which, regardless of the legal issue, the factual background includes a child who has been removed by the state from a parent with a current or former same-sex or transgender parent. Researchers studying other matters have also identified, as participants in their studies, lesbians whose children were removed by the state.

In addition to this anecdotal evidence, one research study examined the significance of numerous factors, including sexual orientation, on black women’s loss of children to the child welfare system, and the results are staggering. The study began using data from 643 black women

29. See, e.g., In re M.C., 123 Cal. Rptr. 3d 856, 866 (Cal. Ct. App. 2011) (child welfare authorities removed child after mother’s new boyfriend stabbed mother’s estranged wife); In re M.L., No. 17-0968, 2017 LEXIS 974 (Iowa App. Sept. 13, 2017) (child raised by mother and her wife removed because of mother’s heroin use); Thorndike v. Lisio, 154 A.3d 624 (Me. 2017) (transgender de facto parent reported the biological parent to the child welfare agency after the ten-year-old son, who had bruises, revealed that his biological mother’s boyfriend had beaten him); In re Christopher YY, N.Y.S.3d (N.Y. App. Div. 2018) (sperm donor estopped from challenging the marital presumption of parentage attached to the biological mother’s wife, and the neglect petitions against the parents and placement of the child in foster care subsequent to the trial court ruling on the marital presumption did not alter the correctness of estopping the sperm donor’s paternity claim); In re Custody of A.F.J., 319 P.3d (Wash. 2013) (nonbiological mother who was a de facto parent under state law called child welfare authorities after the mother’s repeated drug abuse in the presence of the child). The Chicago-based Family Defense Center represented on appeal from termination of parental rights a bi-racial mother who had used marijuana and who was also a lesbian. Young Mother’s Parental Rights Terminated for Smoking Marijuana, FAMILY DEFENSE CTR. (Aug. 4, 2016), https://www.familydefensecenter.net/young-mothers-parental-rights-terminated-for-smoking-marijuana/.

30. One study of thirty-one mothers whose children had been removed noted that two mothers were lesbians. Ana Rocio Escobar-Chew, Marsha Carolan, & Kathleen Burns-Jager, Connecting Trauma and Health for Mothers in the Child Welfare System, 27 J. FEMINIST FAM. THERAPY (2015). In a study of pregnancy among young black lesbians, one of the fourteen young women in the study had given birth to a child at age fifteen and had that child removed by child protective services. Sarah J. Reed, Robin Lin Miller, & Tina Timm, Identity and Agency: The Meaning and Value of Pregnancy for Young Black Lesbians, 35 PSYCHOL. OF WOMEN Q. 571–81, 574 (2011).

collected as part of the Black Women in the Study of Epidemics (B-WISE) research project. Participants were divided among those in prison, those on probation, and those not currently involved in the criminal justice system. Of the 643, there were 339 mothers with at least one biological child under eighteen. Researchers gathered data from those mothers to determine the likelihood of, and factors associated with, either official custody loss through the child welfare system or informal loss, which was defined as a private arrangement for the child to live with someone else that was not ordered by child welfare authorities. Each participant was asked if she had lost custody of any child in the previous year (or the year prior to incarceration for those who were in prison). Of the 339, 145 had experienced official custody loss, 79 had experienced informal custody loss, and 115 had experienced no custody loss.

Researchers asked the participants to self-identify as either gay/lesbian/bisexual or heterosexual and 21.3% identified as gay/lesbian/bisexual. Those who reported being lesbian or bisexual were 4.19 times more likely to have lost official custody when compared with their heterosexual counterparts. In addition, those who experienced official custody loss were over three times more likely than the mothers who experienced no custody loss to identify as lesbian or bisexual. The researchers called for future research to examine why being lesbian or bisexual is predictive of official custody loss for African American mothers.

Beyond this one study, there is demographic information about both same-sex couples raising children and children removed by the state that supports the likelihood of a significant population of parents in same-sex relationships facing child welfare issues.

32. Id. at 286.
33. Id.
34. Id.
35. Id.
36. Id.
37. Id. at 288.
38. Id. at 291. The finding was statistically significant with a p value of <0.001.
39. Id. at 289. The finding was statistically significant with a p value of <0.001.
40. Id. at 293.
Racial disproportionality in state removal of children has been thoroughly documented. African American children make up 13.8% of all children in the country, but make up 22.6% of all children identified by child and protective services as possible victims of abuse and neglect and 24.3% of the population of children in foster care. A November 2016 government report, *Racial Disproportionality and Disparity in Child Welfare*, provides not only those numbers, but also studies finding racial bias, such as two in Texas which found that although African American families were assessed with lower-risk scores than white families, they were more likely to have their children removed. This data bolsters the 2002 analysis of Law Professor Dorothy Roberts in her groundbreaking study of racism in the child welfare system, *Shattered Bonds: The Color of Child Welfare*.

What may be less known is the racial disproportionality of same-sex couples and lesbian mothers raising children. The data on same-sex couples comes from the Census and American Community Survey (ACS). The data on lesbian mothers comes from the National Survey of Family Growth (NSFG). These are population-based sources that provide a vivid picture of parenting demographics, demonstrating that parenting by lesbians and by same-sex couples is most common among African-Americans and that those parents experience economic disadvantage.

Researchers at the Williams Institute at UCLA School of Law, using the Census and the ACS, have found that 41% of African American individuals in same-sex couples are raising children compared to 16%
of white individuals in same-sex couples. These parents do not live in enclaves of gay-friendly communities with statistically higher numbers of same-sex couples; rather, they live in the parts of the country and in the urban neighborhoods where there are higher proportions of African Americans. In addition, children living with same-sex couples are much more likely to be poor than their counterparts living with different-sex couples, and race plays a substantial role in identifying who those poor children are.

Researchers using the nationally representative National Survey of Family Growth (NSFG) compared parents and nonparents who identified as lesbian, bisexual, or heterosexual, and they also found evidence of racial disproportionality. The typical lesbian parent was less likely to have completed college, more likely to be a woman of color, and more likely to live in a central city than her heterosexual counterpart. Lesbian parents were also much more likely than their lesbian nonparent counterparts to be black, Hispanic, and foreign-born; to have less education; and to live in central city areas. Among the Black, non-Hispanic lesbians in the study, 48.8% were parents; for white, non-Hispanic lesbians, 15.2% were parents.

Lesbians were less likely than heterosexuals or bisexuals to have biological children, but the extent of the difference varied substantially by race and ethnicity. “[D]espite media portrayals of lesbian parents as mainly white, well-educated, and middle-class,” the authors note, “the adjusted probability of motherhood for white lesbians is lower than for any other group.” That probability, which they found to be less than 0.18, contrasted with a more-than three times greater adjusted probability

49. Id. at 513.
50. Id. at 522.
51. Id. at 514.
52. Id. at 517.
53. Id. at 522.
of motherhood among black, non-Hispanic lesbians (0.62).\textsuperscript{54} Black, non-Hispanic lesbians were nearly as likely to be biological parents as white, non-Hispanic heterosexual women (0.63).\textsuperscript{55} The researchers concluded, consistent with the Williams Institute data on same-sex couples raising children, that “the sociodemographic characteristics of lesbian parents place their families at a relative disadvantage.”\textsuperscript{56}

Juxtaposing racial disproportionality in the removal of children by the state and racial disproportionality in childrearing by lesbians and same-sex couples does not prove that children raised by lesbians or in same-sex couples are removed by the state. But when read alongside the one study that examined this issue, it is highly suggestive. In addition, there is research showing that LGBT individuals, many of them parents, disproportionately experience numerous risk factors known to correlate with facing child welfare investigations, including homelessness and housing instability, food insecurity, substance abuse, incarceration, a history of physical or sexual abuse, and having been a foster child oneself.

For example, a 2016 study of homeless and housing insecure young adults (eighteen to twenty-four years old) in Harris County, Texas, found that 24% of the overall sample identified as LGBTQ;\textsuperscript{57} 27% of those were parenting or pregnant. Of those in the overall sample who were parenting or pregnant, 32% of the mothers, and 8% of the fathers, identified as LGBTQ. Research shows that even one experience of homelessness increases the risk of child welfare system involvement\textsuperscript{58} and that housing problems delay reunification for 30% to 50% of children in foster care.\textsuperscript{59}

A 2018 study of a nationally representative sample of youth involved in the child welfare system found that, three years after the date the youth were first referred for an investigation, 15.5% identified as lesbian, gay, or

\footnote{54. Id. at 517.} \footnote{55. Id. at 522.} \footnote{56. Id. at 522.} \footnote{57. Sarah C. Narendorf, Sheara Williams Jennings & Diane Santa Maria, Parenting and Homeless: Profiles of Young Adult Mothers and Fathers in Unstable Housing Situations, 97 FAMILIES IN SOCIETY 200–210 (2016) (the definition of mothers and fathers in the study included those who were pregnant or, for men, those who were awaiting the birth of their child).} \footnote{58. Debra J. Rog, Kathryn A. Henderson, Laurel M. Lunn, Andrew L. Greer & Mei Ling Ellis, The Interplay Between Housing Stability and Child Separation: Implications for Practice and Policy, 60 AM. J. COMMUNITY PSYCHOL. 114–24 (2017) (citing numerous studies).} \footnote{59. Patrick J. Fowler & Michael Schoeny, The Family Unification Program: A Randomized-Controlled Trial of Housing Stability, 94 CHILD WELFARE 167–87 (2015) (citing studies).}
bisexual, and their mean age was sixteen-and-a-half years old. Over 29% of those who identified as LGB had a child of their own. The researchers found this to be “a larger than expected percentage,” and indicated a need for services to prevent child welfare involvement of these youth as parents. Involvement in the child welfare system as a child is a risk factor for later facing a child welfare investigation as a parent.

A comprehensive 2016 report using several studies documented LGBT food insecurity. Data from Gallup showed that LGBT adults raising children were 1.71 times more likely than non-LGBT adults raising children to have not had enough money for food in the previous year. The population-based National Survey of Family Growth showed that LGB adults raising children were more than twice as likely as straight adults raising children to have received food stamps in the previous year, and same-sex couples raising children were almost twice as likely as different-sex couples raising children to have received food stamps in the previous year. Research has shown that the odds of a caregiver being investigated for child neglect double if that caregiver experiences food hardship.

More research in this area is needed to document the existence and circumstances of LGBT parents who experience child welfare proceedings. But a group must be seen and acknowledged before it is likely to be the subject of research, and, as the next section explains, this group has remained invisible.

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61. Id. at 12–13 (emphasis added).

62. CHARLYN HARPER BROWNE, CTR. FOR THE STUDY OF SOC. POL’Y, EXPECTANT AND PARENTING YOUTH IN FOSTER CARE: ADDRESSING THEIR DEVELOPMENTAL NEEDS TO PROMOTE HEALTHY PARENT AND CHILD OUTCOMES 11 (2015), (children of youth in foster care are five times more likely to spend time in foster care themselves than children of same-age parents in the general population).


64 Id. at 26.

65 Id. at 27.

II: Invisibility and Its Consequences

This Part speculates about why research and advocacy have neglected this group of same-sex couples with children and their distinctive needs. To begin, the reason behind this cannot be that at least some in this subgroup of parents have transgressed and are, for that reason, unworthy of attention. LGBT prisoners and LGBT persons in the criminal justice system have frequently have been the subject of research and advocacy, yet they too have often transgressed. The LGBT rights movement knows how to be nonjudgmental while working to identify needs specific to LGBT subgroups and to protect those subgroups from discrimination.

That the LGBT parents losing their children are predominantly poor is also an inadequate explanation. Although LGBT organizations focus less than I would like on the concerns of the poorest LGBT individuals and same-sex couples, there have been several reports documenting LGBT

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67. Social scientists and mental health professionals have published many hundreds of articles about gay and lesbian parents. Not one has examined LGBT parents facing removal of their children and loss of parental rights in the child welfare system. See Abbie E. Goldberg, Nanette K. Gartrell, & Gary Gates, Research Report on LGB-Parent Families (2014) (summarizing research and calling for additional research but not mentioning parents in the child welfare system). The one research study containing a finding of the disproportionate extent to which lesbian and bisexual mothers lose their children to the state came not as a result of examining lesbian and bisexual mothers but in a project looking at child custody loss where the data collection included a question about sexual orientation. Harp & Oser, supra note 28.

68. LGBT litigation groups have provided occasional representation and assistance in cases arising in the child welfare context. The National Center for Lesbian Rights (NCLR), for example, represented an ex-partner, nonbiological mother who sought de facto parent status for a child who entered foster care after the biological mother abused an older daughter. A.G. v. D.W., No. B175367, 2005 WL 1432744 (Cal. Ct. App. 2003). NCLR also regularly provides behind-the-scenes, and therefore unpublicized, technical assistance to lawyers representing gay and lesbian parents, and such cases can include those arising in the child welfare context. The ACLU of Alaska filed a brief, reviewed by the ACLU LGBT Rights Project, in the case of Gloria and Alice, urging recognition of the marital presumption of parentage. Amicus Curiae Brief of the ACLU of Alaska Foundation, G.W. v. Alaska, No. S-16516 (Alaska Sup. Ct. Mar. 28, 2017) (unreported; on file with author). These sporadic contributions do not alter the fact that no organization has explicitly identified LGBT parents facing state removal of their children as a constituency that they serve; developed a project or sought funding to serve this population; or identified the issues this population faces and initiated efforts, alone or in coalition, to remedy those wrongs.

poverty and identifying critical issues; none includes state removal of the children of poor LGBT parents.\textsuperscript{70}

I believe the explanation begins with examining the distinctive place parenting by same-sex couples has held in LGBT advocacy. Initially, critics argued that children raised by LGBT parents would suffer disadvantage.\textsuperscript{71} They opposed adoption by lesbian and gay individuals and same-sex couples.\textsuperscript{72} They subsequently opposed same-sex marriage on the grounds that it was bad for children.\textsuperscript{73} Now that they have lost on marriage, they argue that those with religious or moral objections must be allowed to discriminate against LGBT families.\textsuperscript{74}

LGBT advocates have been able to point to decades of research demonstrating that children are not harmed living with gay and lesbian parents.\textsuperscript{75} As a result of that research, every major child welfare and mental health organization in the country has supported gay parenting in courts and legislatures.\textsuperscript{76} Advocacy organizations have in turn used that research to develop best practices for adoption agencies working with


same-sex couples. The most prominent of these efforts is the Human Rights Campaign’s All Children All Families Project.

No one has ever claimed that lesbian and gay parents are faultless or that they are more fit as a group than heterosexual parents are as a group. Nonetheless, gay rights advocates might imagine that drawing attention to even one lesbian or gay parent who is neglectful or abusive could give opponents ammunition to assert the undesirability of lesbian and gay parenting generally.\(^77\) This concern should not stop advocates for LGBT families from addressing the needs of LGBT parents in child welfare proceedings, however, as the first goal in such proceedings is reunification of the family. Whether that family is a same-sex couple and their child or a single LGBT parent and child, advocates should want to be vigilant that opposition to LGBT parenting does not infect the decision-making of child welfare authorities.

The fight for marriage equality set up a particular dynamic. Opponents cited concerns about LGBT parenting, and proponents responded by portraying same-sex couples raising children as practically perfect. Going further, the desirability of same-sex couples raising children was most championed in the context of their willingness to adopt children in state care. I have written elsewhere about the characteristics of the same-sex couple plaintiffs in the Supreme Court marriage equality litigation.\(^78\) Those couples were disproportionately white, male, and raising adoptive children. Although only 22% of same-sex couples with children have an adopted child, 2.5 times that percentage of the parent-plaintiffs—55%—were raising adopted children.\(^79\)

The most direct juxtaposition of such families with the families of children in the foster care system came in Judge Posner’s Seventh Circuit same-sex marriage ruling in \textit{Baskin v. Bogan}.\(^80\) Essentially, the opinion referred to children in foster care as “abandoned” and “unwanted,” and to the desirability of allowing same-sex couples to marry so that they could

\(^{77}\) Such a result ensued in California in 1986 when a male couple who had presented to a child welfare agency as a heterosexual married couple beat to death a child placed in their care. As a result of this tragedy, the California Department of Social Services issued a new policy disapproving all adoption by unmarried couples. The policy was widely understood as a decision to disapprove adoption by gay and lesbian couples. See Marie-Amelie George, \textit{Agency Nullification: Defying Bans on Gay and Lesbian Foster and Adoptive Parents}, 51 \textit{Harv. Civ. Rts.-Civ. Lib. L Rev.} 363, 407–08 (2016).


\(^{79}\) \textit{Id.} at 106, 107.

\(^{80}\) \textit{Baskin v. Bogan}, 766 F.3d 648 (7th Cir. 2014).
provide better homes for those children. Posner implicitly differentiated marriage-seeking, largely white, economically advantaged same-sex couples from marriage-rejecting, largely black, economically struggling mothers, who, in his eyes, did not want their children or have sufficient personal responsibility to care for them.

This offensive and wrong-headed view of the parents who lose their children to the state should have garnered some pushback from gay rights advocates. The child welfare system separates too many children from their parents, often using vague child neglect statutes employed almost entirely against poor communities. Research shows that, in marginal cases, children who remain at home do better than those who are removed and placed in foster care. Racial and economic justice activists decry the mass removal of poor children of color from their families. They refer to these practices as “Jane Crow.” The research study cited earlier in this article showed that families headed by African-American lesbian and bisexual mothers are especially vulnerable to losing their children.

81. Id. at 654, 662, 672.
82. If Judge Posner had read Dorothy Roberts’s book, Shattered Bonds, he would have been introduced to a vast network of mothers in his home town of Chicago who had not abandoned their children, wanted their children returned very much, and were facing daunting, systemic, and unjustified hurdles in achieving family reunification.
83. For an example of the differential application of drug laws against poor parents, see Emma S. Ketteringham & Mary Anne Mendenhall, Some Pro-Pot Parents Blog, Others Lose Their Children, HUFFINGTON POST (Dec. 12, 2012), https://www.huffingtonpost.com/emma-s-ketteringham/some-pro-pot-parents-blog-_b_1962580.html.
87. Harp and Oser, supra note 28.
Now that the assault on LGBT parenting has moved to the arena of legislation and litigation to allow anti-gay discrimination based on religious and moral beliefs, LGBT advocates counter with uncritical assertions of the numbers of children in foster care and the tragedy of denying those children capable foster and adoptive parents. But this obscures the earlier tragedy producing the large number of children in state care—the excessive removal of children from their parents, some of whom are LGBT.

It is striking how little we know about the parents of children who are adopted out of foster care by same-sex couples. In litigation, complaints may provide a brief description of the parents and their transgressions, but this is likely just enough to present a profound contrast to the same-sex couples who want to adopt their children. For example, April DeBoer and Jayne Rowse, one of the couples in the marriage equality cases consolidated in the Supreme Court, described the circumstances leading to their adoption of three children as follows: “R’s” biological mother was nineteen-years-old, had received no prenatal care, and had given birth at home; “N” was born to a homeless mother with psychological impairments; and “J” was born prematurely to a drug-addicted prostitute who abandoned him at birth.

Hidden from sight in such descriptions are the numerous systemic impediments the birth parents may have faced along the way, such as the state’s failure to provide legally mandated services to prevent the removal of children; lack of adequate mental health and substance abuse treatment facilities and unrealistic timeframes for rehabilitation; insufficient reunification efforts; and requirements for reunification that are inappropriate or that fail to account for the absence of paid leave, safe and affordable housing, and public transportation. These impediments are not accidental. They are the deliberate consequence of eliminating the social safety net and privatizing dependency; constructing poor mothers of children in foster care as morally culpable; and creating monetary incentives for states to place children for adoption rather than return them to their parents.

88. For example, the January 2019 issue brief, Every Child Deserves a Family, features prominently on the first page a graphic containing in large, bright orange numbers, the number of children in foster care and awaiting adoption. FAMILYEQUALITY.ORG, http://www.lgbtmap.org/file/Brief-Kids-Pay-Price-January-2019.pdf.
90. See Robert, supra note 44; Laura Briggs, Somebody’s Children: The Politics of Transracial and Transnational Adoption 113 (2012).
When advocates for LGBT adoption turn a blind eye towards the systemic injustices of the child welfare system, they simultaneously miss the parents with same-sex partners who are victimized by those injustices and who may face additional hurdles because they are LGBT. They also miss the children of those LGBT parents who suffer real harm, as do all children, when they are inappropriately deprived of their parents.91

Lesbian mothers whose children are removed by the state suffer from what I call “exacerbated invisibility.” An invisible population is unseen, hidden, and unnoticed. Exacerbated invisibility occurs when a population with some characteristics common to the unseen group receives substantial notice, thereby eclipsing the possibility of imagining beyond that more visible group. Practically perfect same-sex couples raising children—often children adopted from foster care—were prominent in the fight for marriage equality and remain prominent in the fight against religious-based discrimination. They have been implicitly, if not explicitly, contrasted with the families of the children waiting in foster care for adoptive homes. I believe these circumstances made it impossible to recognize that there are same-sex couples at risk of losing their children to the state—and children at risk of losing their LGBT parents—and that those families have distinctive needs. This might explain why the Human Rights Campaign’s All Children All Families Project is self-proclaimed to exist because of the LGBTQ youth in foster care and the LGBT adults who wish to become foster and adoptive parents, but not because there are LGBT parents and their children who are being inappropriately and unnecessarily separated from each other by the child welfare system.

It is not necessary to choose between work on behalf of LGBT parents whose children face removal and LGBT individuals and couples who want to adopt out of foster care; their interests are not at odds. But the two groups of parents have vastly different demographics. Those who adopt children are much more likely to be white and economically privileged; those losing their children are much more likely to be black or brown

and poor. Seeing and advocating for parents who face child welfare investigations will bring LGBT advocates face to face with the realities that advocates for racial and economic justice have long articulated, and this will advance the well-being of poor children and children of color. It will end the invisibility of these LGBT families. This work is a critical component of any commitment to address the needs of LGBT families most likely to struggle with the effects of racism and poverty.

While a more critical view of the system that results in children in foster care should change the way advocates talk about those children and their families, this will in no way impede forceful opposition to anti-gay adoption and foster parenting legislation and litigation. There will always be some children who need foster and adoptive parents, and discrimination against the LGBT individuals and same-sex couples who want to care for them is wrong.

Here is one example of the exacerbated invisibility of LGBT parents facing child removal. In December 2014, the Department of Health and Human Services (HHS) published a report co-authored by Williams Institute demographer Gary Gates entitled Human Services for Low-Income and At-Risk LGBT Populations: An Assessment of the Knowledge Base and Research Needs. This report of over 150 pages included one paragraph acknowledging the possibility of LGBT parents facing investigation by child welfare agencies. It noted that:

A small proportion of LGBT parents may be involved in child welfare agency investigations intended to protect children from abuse or maltreatment. *We did not identify any previous research on LGBT parents’ experiences with these types of services.* Studies in this area may explore whether and how service provision, quality, or outcomes differ for LGBT and non-LGBT parents. Specific research questions may include the following: [1] To what extent are LGBT parents involved in child protective service interventions? Does the likelihood of this involvement differ between LGBT and non-LGBT parents? Does it differ by agency location? [2] What are the experiences of LGBT parents who are investigated or whose

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children are removed from their care? What services or assistance do they receive? Do these experiences differ from those of non-LGBT parents?94

The next month, the follow up HHS-commissioned report made recommendations for future research.95 It identified four topics, three of which concern LGBT youth.96 Those three topics were: (1) “risk of experiencing child maltreatment . . . among LGBT people,” (2) “experiences of LGBT youth in child welfare programs,” and (3) “effectiveness of child welfare services for LGBT youth.”97 The fourth topic, the only one concerning adults, identified for future research “participation of LGBT adults in child welfare programs.”98 Although this might have included LGBT parents whose children are removed from the home, it did not. Rather, the only two research questions identified under this topic concerned the experiences of prospective LGBT foster and adoptive parents with public child welfare agencies and the extent to which those agencies engage LGBT adults as foster and adoptive parents.99 Because the list of recommendations ignored LGBT parents whose children are removed, it also omitted any topics concerning the children of those parents.100

Thus, what effectively happened here was that the first report explicitly found that there was no research on LGBT parents whose children are removed by the state and, then, the second report made recommendations for future inquiry that guaranteed there would be no research. This indifference to a highly marginalized population of LGBT-headed families had immediate policy consequences.

In the waning weeks of the Obama administration, HHS promulgated a final rule revamping the Adoption and Foster Care Analysis Reporting System (AFCARS), the statutorily mandated data collection and analysis program of the Administration on Children, Youth and Families (ACYF)
within HHS.\footnote{101} Under the rule, state agencies must collect and report data on the sexual orientation of children who enter state care, as well as that of the foster parents, adoptive parents, and legal guardians with whom children are placed.\footnote{102} This final rule was the culmination of efforts by LGBT researchers and advocacy organizations.\footnote{103} However, the rule is silent on, and therefore does not require, data collection on the sexual orientation of parents whose children are removed from their homes and placed in foster care. Even after years of advocacy efforts, and during the most LGBT-positive administration in history, this was a missed opportunity to document the existence of a group of disadvantaged LGBT parents with distinctive legal issues. It is those distinctive issues to which I now turn.

### III. The Distinctive Legal Issues

Lesbian mothers and same-sex couples facing child welfare investigations encounter the same unjust obstacles other parents face. But there are three distinctive issues affecting lesbian mothers and same-sex couples that need immediate attention. The first two issues are discrimination and accurate identification of parentage—issues that arise in many contexts in addition to child welfare proceedings. This Part focuses on the aspects of those two issues that are particularly salient when the state removes children from LGBT parents. The third issue is unique to child welfare proceedings. It concerns the legal significance of families and relatives in such cases, and the importance, therefore, of determining who counts as family. I explore these three issues in turn.

#### A. Discrimination

From the moment a child welfare worker responds to a report concerning alleged abuse or neglect, there are many points at which discrimination on the basis of sexual orientation or gender identity can take place. The first, of course, is whether to immediately remove the child from the home. A child’s gender variance should never trigger removal from supportive
parents, but Hailey and Jane faced the additional hurdle of an agency’s assumption that their lesbian relationship caused Jayden to be confused, prompting emergency removal with no prior notice. When they did go to court, they faced a judge who ordered foster care so that Jayden could be with “healthy parents.”

The story of Hailey, Jane, and Jayden contains another cautionary note. Jane contacted the state agency that ultimately removed Jayden because her teenage son attempted suicide and she was too poor to engage private therapeutic services for him. It was that teenager’s complaints about his family that triggered Jayden’s removal. Poor families face surveillance because they live in public housing, receive Temporary Assistance for Needy Families (TANF) or other public benefits, or, as in this instance, need other help they cannot pay for in the private sector. Poor LGBT parents are thereby exposed to the possibility of discrimination by governmental officials who may be all too ready to judge them as behaviorally or ethically deficient because they are poor.

Indeed, as law professor Khiara Bridges has documented, poor pregnant women who apply for Medicaid benefits in order to obtain prenatal care subject themselves to a series of highly intrusive questions unconnected to either their financial eligibility or physical health. These interrogations touch on, among other things, their households, social supports, whether the pregnancy is wanted or unwanted, and the existence of family problems. A poor woman asked the long battery of required questions knows that the state is trying to determine if she will be a good mother. If that woman has a same-sex partner, the questions may necessitate disclosures she would rather keep private. As a poor woman, however, she does not have that option.

The heightened vulnerability of poor LGBT parents can be illustrated by contrasting the story of Hailey and Jane with that of Sean, another gay

105. SOLOMON, supra note 9, at 648.
106. Id.
parent who supported his gender-variant child. Sean, a single gay man, adopted a five-year-old girl from foster care. She favored boy clothing and short haircuts. By the end of third grade, she was asking to be called Michael and wanted to use the boy’s restroom. Sean discussed this with Michael’s therapist and a local LGBT health clinic, and at their suggestion, he made an appointment with a university-affiliated endocrinologist to explore hormone therapy. The day before the appointment, child protective services (“CPS”) pulled Michael out of class to interview him. Sean learned that an older physician he had never met, who knew or assumed that Sean was gay, called CPS because he believed Michael’s gender expression had to be related to sexual abuse. CPS launched a full investigation.108

Sean was economically comfortable, lived in an urban gay mecca, and had the resources to aggressively fight the child welfare authorities. His advocacy and his threats of legal action made it possible for Michael to remain at home. Hailey and Jane had met in a homeless shelter and were economically struggling to raise their children in a trailer in a Midwest state. They lacked sufficient power to resist the state’s intrusion into their family.

Openly articulated discrimination may be less common than in the past,109 and it is difficult to know the extent to which it continues to exist. As noted above, AFCARS does not, and will not in the future, require data collection on the sexual orientation of parents whose children are removed, thereby depriving researchers of meaningful information from which to develop hypotheses. This makes especially important the result of the B-WISE research finding lesbian and bisexual women vastly overrepresented in the population of black mothers whose children were removed by the state. In most jurisdictions, child welfare proceedings are closed to the public. Opponents of this closed system cite numerous evils that thereby remain immune from critical scrutiny.110 Discrimination is one of those evils.


Even when temporary removal is justified, as in the instance of Hilda’s son, Robert, there are subsequent opportunities for discrimination. The state is required to provide services aimed at reunifying the parents and child. An agency has virtually unfettered discretion, however, in identifying requirements that a parent must meet before reunification and in placing conditions on the parent’s ability to visit with the child while in foster care. There is a special reason to be concerned when faith-based agencies, such as that assigned to Hilda’s family, provide these reunification services. These are often the same agencies that refuse to license same-sex couples as foster and adoptive parents.

Ten states have passed legislation explicitly allowing child placement agencies receiving state funding to discriminate in provision of services if nondiscrimination would conflict with the religious or moral beliefs of the agency or its workers. Some laws are written broadly, specifying that no agency can be required to provide “adoption services” that conflict with sincerely held religious beliefs. Others contain an exhaustive list of services, such as the Texas statute, that explicitly names family preservation and reunification services in a list of child welfare activities that a private agency receiving state funding may decline to provide if it interferes with the agency’s sincerely held religious beliefs.

Although Kansas, where Hilda’s family lived, did not at the time have a law explicitly protecting child welfare agencies that discriminate, it did pass such a law in 2018. Kansas also has a general statute prohibiting the state from excluding from government programs or otherwise burdening an individual or entity who acts or refuses to act based upon a sincerely held religious belief. A faith-based agency might try to invoke even such a statute as justification for retaining a contract with the state to deliver child welfare services while discriminating against LGBT parents.

LGBT advocates should be concerned about the impact of these laws on the provision of services during the critical period after removal of a child, which is when the actions of a supervising agency have enormous impact on whether the child will ever be returned home. In addition, these laws

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Neglected Lesbian Mothers

shield agencies that place the child of a lesbian mother in a home with foster parents who actively disparage LGBT people. Agencies that refuse to license same-sex couples as adoptive parents take that position up front and openly, and the couple may be able to seek out a different agency as a result. Parents whose children are in foster care, however, have no control over the agency assigned to work with them, and the vast discretion afforded to said agency means that bias may be difficult to detect.

Advocates have criticized religious exemption laws, but the distinctive plight of LGBT parents whose children have been removed has received scant attention. In September 2017, the Movement Advancement Project, the Child Welfare League of America, and the National Association of Social Workers launched the “Kids Pay the Price” campaign to bring attention to the harms of allowing faith-based agencies to discriminate.117 The overwhelming focus in the campaign’s ads and literature is on discrimination against prospective foster and adoptive parents and then, secondarily, on inappropriate placements and services for LGBT youth in foster care.118 Although the text of the principal campaign publication includes refusal to offer family reunification or support services to a family with two same-sex parents or an LGBT parent on its long list of potential evils that agencies could commit, the narrative portion of the publication focuses on children in need of adoptive homes, as does the advertisement the campaign produced and the examples provided to media covering the campaign.119 The Human Rights Campaign produced a 2017 report on the same subject, Disregarding the Best Interest of the Child: License to Discriminate in Child Welfare Services.120 It, too, fails to identify the harms to children and parents of assigning supervision of a child in foster care whose parents are LGBT to a faith-based agency that discriminates on the basis of sexual orientation or gender identity.

The city of Philadelphia cancelled Catholic Charities’ contract to license foster and adoptive parents because of their anti-gay policies, but Catholic Charities still provides case management services to a large segment of

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118. Id.
the Philadelphia children in foster care and their parents, including LGBT parents. Such services often determine whether a child will return home, and the City, as well as LGBT advocates, should be as concerned about anti-gay discrimination in that context as in the context of licensing foster and adoptive parents.

The American Civil Liberties Union (ACLU) has filed a court challenge to the Michigan statute allowing faith-based agencies to discriminate. The plaintiffs are two lesbian couples who sought to adopt and were turned away and a woman who as a child was placed in foster care and who objects, as a Michigan taxpayer, to permitting discrimination that would block the licensing of qualified foster parents on the basis of an agency’s religious beliefs. Without a plaintiff alleging discrimination in reunification and other support services, the harm such discrimination causes by separating children from parents who are able to care for them remains invisible.

B. Accurate Identification of Parentage

The most critical legal issue that can arise for a same-sex couple in a child welfare case is whether the biological mother’s partner (or former partner) will be considered a parent. If the partner is living in the home with the biological mother and the children, certain consequences kick in. Parents in child neglect and abuse cases are generally entitled to court-appointed counsel. They also must receive federally mandated reunification services aimed at returning children to their parents. In addition, before such parents can be permanently deprived of their children, the state must prove the elements of a separate termination of parental rights statute by clear and convincing evidence.

When the second parent is not living with the child and there are no allegations of abuse or neglect involving that parent, different consequences


ensue. A large number of states require the agency to notify an absent parent of the child welfare proceeding.126 In some states, a nonoffending parent is entitled to immediate physical custody of the child pending resolution of the case or to placement of the child once the charges are adjudicated.127 In fewer states, the availability of a nonoffending parent deprives the court of jurisdiction to hear the child welfare case once legal custody has been transferred to that parent.128

Nonbiological parentage has, of course, been the subject of scores of cases, law review articles, statutes, and public policy efforts, and there are numerous jurisdictions in which a biological mother’s same-sex partner can be adjudicated a legal parent.129 But the actors in a child welfare proceeding—from the agency workers, to the counsel appointed for a biological parent, to the judge—may be unaware of those precedents or may refuse to apply them. In a particularly tragic case in the District of Columbia, a former partner who had raised her nonbiological child on her own for six years lost that child forever when the biological mother was found to have neglected her other children and ultimately lost all her parental rights. No one flagged that the former partner qualified as a de facto parent under D.C. law and could have filed for custody of the child she had raised.130

There are some states that have gotten it right, however. In a particularly notorious California case, the state took custody of a child after the child’s biological mother, Melissa, conspired with her new boyfriend to attack the child’s nonbiological mother, Irene, landing Melissa in jail and Irene in the hospital.131 Irene was a legal parent both because she received the child into her home and held out the child as her own and because she was married to Melissa at the time of the child’s birth.132 The state appointed counsel for and provided reunification services to Irene, as well as Melissa.133

127. Id. at 205–06.
128. For a summary of states falling into each of these categories, see id. at 204.
130. Telephone conversation of author with Chandra Walker Holloway, attorney for biological mother (May 23, 2013) (on file with author).
132. Id. at 871.
133. Id. at 866.
The legal status of a partner of a child’s biological or adoptive parent has arisen most frequently in private, post-dissolution litigation, with a biological/adoptive mother opposing the child’s other parent’s visitation rights or custody. A child welfare proceeding provides another venue in which a biological/adoptive parent may seek to erase another parent from the child’s life. Melissa did not want Irene to be considered a parent, but she was unsuccessful because California law already clearly recognized nonbiological parents in child welfare cases. Advocates for lesbian and gay families in other states should expect such cases and should consider education and outreach efforts to protect the nonbiological parent-child relationship in this context. This is another instance in which the closed nature of most child welfare proceedings can lead to injustice by making it impossible to monitor appropriate determinations of parentage when the biological parent objects.

Problems in determining parentage may occur, however, even when the parents are united. Consider the example of Alice and Gloria from Alaska. Alice was disregarded as a parent throughout the entire process, even though Gloria completely supported her assertion of parentage. In Alaska and a few other states, a parent in the context of a child welfare proceeding is defined as a “biological or adoptive parent.” A 2014 Iowa Supreme Court ruling applied that definition literally, thereby excluding Daniel, a father who, on his own for two and a half years, had raised the child born to his wife while she was in prison. The court said the statute’s language was unambiguous and that Daniel was not a necessary party to the child welfare proceedings because he was not the child’s biological father. The court reasoned that limiting the definition of parent to biology and adoption was good policy because it avoided “superfluous litigation that would bog down timely decision making for children in

134. The first case to hold that California’s “holding out” parentage was not automatically rebutted by evidence that the father was not the child’s biological parent occurred in the context of determining parentage in a child welfare proceeding. See In re Nicholas H, 46 P.3d 932 (Cal. 2002).
136. See, e.g., ALASKA STAT. § 47.10.990 (26) (1957) (biological or adoptive); IDAHO CODE § 16-2002 (11) (1963) (birth or adoptive mother, adoptive father, biological father of child conceived or born during marriage, unmarried biological father) (emphasis added); INDIANA CODE ANN. § 31-9-2-88 (LexisNexis 2011) (biological or adoptive parent); IOWA CODE § 232.2 (39) (2016) (biological or adoptive); KY. REV. STAT. ANN. § 600.020 (LexisNexis 1986) (biological or adoptive mother or father); WIS. STAT. § 48.02 (1971) (biological or adoptive but also includes a husband who has consented to artificial insemination of his wife pursuant to numerous statutory requirements).
137. In re J.C., 857 N.W.2d 495, 508 (Iowa 2014).
need of assistance. . . .” Needless to say, such an interpretation impacts all nonbiological parents in same-sex couples. It also disregards the developments in modern parentage law that reflect the use of assisted reproduction and other complex ways in which people have families.

Courts and agency personnel in child welfare cases are accustomed to inquiring about a child’s biological father, but this is not always the appropriate inquiry. A New York case, described by the mother’s attorney from Brooklyn Defender Services, illustrates this problem. The biological mother had two children. The biological father of one child was in court for the hearing when the petition was filed. The agency said it did not have contact information for the other father. Because the mother’s attorney was attuned to parentage for same-sex couples, that attorney reported to the court that the other legal parent was the woman to whom the mother was married at the time of the second child’s birth. That parent was no longer living with the biological mother and already had notice of the proceedings. The judge persisted in inquiring who the father was, and the lawyer argued that there was no legal father, that the biological father was a sperm donor, and that notice to him was not appropriate. Eventually, the judge understood the situation, did not require notice to the biological father, and apologized to the biological mother.

The mother’s attorney believed that, even in New York City courts, there would be some judges who would have ruled differently. In parts of the country less sympathetic to same-sex couples raising children, it may be even more difficult to get agency personnel and judges to accurately determine and apply the law regarding legal parentage. This is another instance in which the fact that child welfare proceedings are usually closed makes it difficult to learn the extent of a serious problem affecting same-sex couples raising children.

138. Id. at 503.
139. Author conversation with Kylee Sunderlin (June 16, 2017) (on file with author).
140. Id.
141. Id.
142. Id.
143. Id.
144. Id.
145. Id.
146. Id.
C. Identifying a Child’s Relatives or Family Members

Relatives of a child removed by the state have a status with no equivalent in other areas of family law. This premise opens up the possibilities for a partner or former partner who has played a parental role in the child’s life and who may have much to offer the child. This Section addresses the definitions of “relative” under state laws and the legal significance of meeting that definition. It then identifies the potential conflict that might ensue if the parent, or the parent’s family of origin, does not want a former partner involved with the child.

1. The Role of Family Members

Since the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), federal law has required states to consider giving preference to relatives over unrelated persons in foster homes when placing a child.147 The federal Fostering Connections to Success and Increasing Adoptions Act of 2008 subsequently expanded the significance of relative status. It requires that, within thirty days of removal, “the state shall exercise due diligence to identify and provide notice to the following relatives: all adult grandparents . . . and other adult relatives of the child . . . subject to exceptions due to family or domestic violence . . . .”148 The notice must explain the options for participating in the care and placement of the child, describe the requirements to become a foster parent and the services and support that are available for children placed in foster homes, and describe the availability of kinship guardianship assistance payments, if the state provides such assistance.149 The Fostering Connections Act also makes it easier for relatives to become licensed foster parents by permitting waiver of nonsafety-related licensing standards.150

Federal law does not define “relative,” instead leaving the definition to each state. Who counts as a relative under state law, regulation, or policy is of critical significance when a child is removed from a parent who has, or had in the past, a same-sex partner who participated in raising the child. As discussed in Section B above, there are many states in which a partner or former partner can meet the definition of a parent and should be treated as such in the child welfare proceeding. There are circumstances, however, under which a partner or former partner will not be a legal parent. For

148. Id. § 671(a)(29) [hereinafter the Fostering Connections Act].
149. Id. § 671(a)(29)(B)–(D).
150. Id. § 671(a)(10)(D).
example, the particular state may have a narrow definition of parent that the individual cannot satisfy. Alternatively, the partner or former partner may have raised the child but not since birth and may be more of a stepparent, even if not married to the biological parent. It would be better policy than what is currently in place in many states for such a person to count as a “relative” and to receive the required notice concerning the child and, as a result, the opportunity to be considered for preferential placement.

Completely outside the context of LGBT families, child welfare advocates and professionals have recognized that children often have familial relationships with adults who are not recognized as legal family members. Therefore, a number of states use expansive definitions of “relative” to capture those relationships. California uses the term “nonrelative extended family member” (NREFM), defined as any “adult caregiver who has an established familial . . . or mentoring relationship with the child.” Several states, including Arkansas, Georgia, and New Mexico, use the term “fictive kin.” For example, New Mexico’s definition of “fictive kin” is a “person not related by birth or marriage who has an emotionally significant relationship with the child.” “Relatives” are then defined as “mothers, fathers, brothers, sisters, grandparents, aunts, uncles, nieces, nephews, first cousins, mother-in-laws, father-in-laws, sister-in-laws, and brother-in-laws, as well as fictive kin.” Hawaii uses the culturally specific term “hanai relative,” which includes an adult,

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151. In Illinois, for example, planning for the adoption of a child and then raising that child as a parent for several years will not make someone a parent unless he or she completes the formal adoption of the child. See In re Scarlett Z.-D., 28 N.E.3d 776 (Ill. 2015). The same person would clearly be a legal parent in other jurisdictions. See, e.g., Chatterjee v. King, 280 P.3d 283 (N.M. 2012).

152. As a nonparent, a partner or former partner should not trump the rights of the parent. There are justifiable concerns that kinship placement diverts attention and resources from reuniting parent and child. See ANNIE E. CASEY FOUNDATION, THE KINSHIP DIVERSION DEBATE: POLICY AND PRACTICE IMPLICATIONS FOR CHILDREN, FAMILIES, AND CHILD WELFARE AGENCIES 8, 9 (2013). It is always critical to distinguish between a same-sex partner who is a child’s legal parent and thus equal in legal and constitutional status to the child’s biological parent, see supra Part III(b), and a same-sex partner who is not a legal parent but who should come within the definition of “relative” for kinship care purposes.

153. CAL. WELF. & INST. CODE § 362.7 (West 2014).


156. Id. § 8.26.4.7 (Y).
nonblood relative found “to perform or to have performed a substantial role in the upbringing and or material support of a child . . . .”\textsuperscript{157}

Some states do not define “relative” expansively or use a term such as “fictive kin,” but do include for preferential placement those individuals who have played a particular role with a child. Pennsylvania, for instance, includes an “individual with a significant, positive relationship with the child or family”\textsuperscript{158} and Arizona lists “a person who has a significant relationship with the child.”\textsuperscript{159}

Perhaps because “relatives” appears in two different federal statutes passed more than ten years apart, the same state may define the term inconsistently. For example, the section of the New Mexico Administrative Code requiring notification to “relatives” of a child’s removal requires notice only to “grandparents, aunts and uncles, adult siblings, and any other relative that the parent identifies as a potential placement resource[,]”\textsuperscript{160} even though, for foster care placement purposes, the New Mexico Administrative Code defines relatives to include “fictive kin.” North Carolina allows for placement with “nonrelative kin,”\textsuperscript{161} and the agency policy manual defines kinship as “the self-defined relationship between two or more people . . . based on biological, legal, and/or strong family-like ties,”\textsuperscript{162} but the statute requires the agency to notify only relatives and custodial parents of the child’s siblings or those with legal custody of the child’s siblings.\textsuperscript{163}

This area of law urgently needs advocacy on behalf of children raised by same-sex couples. Numerous states use a narrow definition of “relative”

\begin{enumerate}
\item \textsuperscript{160} N.M. Code R. § 8.10.7.7 (West 2010).
\item \textsuperscript{161} N.C. Gen. Stat. Ann. § 7B-505(c) (West 2017).
\item \textsuperscript{163} N.C. Gen. Stat. Ann. § 7B-505(b) (West 2017).
\end{enumerate}
in statutes or regulations. Louisiana\textsuperscript{164} and Michigan,\textsuperscript{165} for example, are among several states that contain an exclusive list of specific legal relationships.\textsuperscript{166} Maryland and Nevada limit relatives to those related by blood or marriage within five degrees of consanguinity or affinity.\textsuperscript{167} The Maryland definition is explicitly based on the state’s estates and trusts code,\textsuperscript{168} even though the purpose of orderly property distribution through intestate succession bears no resemblance to the purpose of optimal child placement decisions. Advocates in these states should look for opportunities to expand the definition of relative, using the available more inclusive models. This is not an exclusively same-sex couple issue, and therefore other advocacy organizations should be willing to join in such efforts. For example, Grandfamilies.org, a national legal resource organization that supports grandfamilies, states that, when it comes to defining “relative,” “it is best practice . . . to include ‘fictive kin”—i.e., god parents and people with close, family like relationships with the child.”\textsuperscript{169}

\textsuperscript{164.} By statute, “relatives” for purposes of kinship foster care placement are limited to those persons related by blood or marriage in at least the second degree to the child’s parent or stepparent. \textit{La. Stat. Ann.} § 46:286.1(D)(1) (2017). The state’s administrative code further clarifies that subsidized kinship placements are limited to biological or adoptive relatives who are:

1. grandfather or grandmother (extends to great-great-great);
2. step-grandfather or step-grandmother (extends to great-great-great);
3. brother or sister (including half-brother and half-sister);
4. uncle or aunt (extends to great-great);
5. first cousins (including first cousins once removed);
6. nephew or niece (extends to great-great);
7. stepbrother or stepsister.

\textit{La. Admin. Code tit. 67 § 5327(A).}

\textsuperscript{165.} Related means “the relationship by blood, marriage, or adoption, as parent, grandparent, great-grandparent, great-great-grandparent, aunt or uncle, great-aunt or great-uncle, great-great-aunt or great-great-uncle, sibling, stepsibling, nephew or niece, first cousin or first cousin once removed, and the spouse of any of the individuals described in this definition, even after the marriage has ended by death or divorce.” \textit{Mich. Comp. Laws Ann.} § 722.111(y) (West 2018).

\textsuperscript{166.} When a biological mother is or was married to a same-sex partner, the stepparent relationship may be on the list of relatives. \textit{See Mich. Comp. Laws Ann.} § 722.111(y) (West 2018). Oregon’s regulation includes “stepparent(s) or ex-step parents who had a personal relationship with the child entering foster care.” \textit{Or. Admin. R.} 413-070-0069 (2017). This is insufficient because a same-sex partner can participate fully in raising a child without being married to the child’s biological parent.


\textsuperscript{168.} \textit{Md. Code Ann. Est. & Trusts} § 1-203 (West 2018).

In a state that broadly defines relatives entitled to preferential placement, advocates should urge that regulations governing notice should be reformed to render them consistent with the Fostering Connection Act. It does little good to provide for a placement preference with a person who does not know that the child has been removed by the state. States may be reluctant to expand notice requirements because of the time and effort involved in determining who to notify, but the addition of a category that includes those who have played a parental role in the child’s life would not create a significantly more onerous burden than does requiring the tracking down of distant cousins and other relatives.

Identification as a family member also matters during the stage in child welfare proceedings in some states known as “family group decision-making” (FGDM). This is a generic term for many different processes that involve family members in decisions about the future of a child’s care. Child welfare agencies work in tandem with family members to determine what is best for the child. The philosophy of FGDM emphasizes a highly inclusive definition of family, including talking to the child about who he or she considers family.170

2. Potential Roadblocks to a Same-Sex Partner’s Status as a Family Member

Even when state law is expansive enough to include a current or former same-sex partner within the definition of relative, there may be other impediments to that person’s inclusion in the process. These include discrimination as practiced by agencies, especially those that are faith-based, and hostility by the child’s parent or other relatives.

Notification of relatives, inclusion of those relatives in decision-making, and identification of preferences for the child’s placement all lie within the purview of the agency supervising the case once the child has come under the jurisdiction of the court. An agency that refuses to license LGBT foster parents will not license a current or former same-sex partner as a kinship caregiver. This may deny the child the best possible placement opportunity. This is another reason to oppose legislation allowing faith-based agencies to determine child welfare services based upon their religious beliefs, rather than the child’s best interests.171

171. Indeed faith-based agencies’ discriminatory practices could exclude any LGBT relative, such as a grandmother or adult sibling in a same-sex relationship, from providing kinship care.
Parents are justifiably given a role in identifying family members for possible kinship placement. Federal law and conforming state law require agencies to notify relatives identified by the parent, but this is not always a reliable way to locate a former same-sex partner who has raised a child. Consider the example of Jerome given at the beginning of this article.\textsuperscript{172} When his parents split up, the biological mother, Jamie, kept the nonbiological mother, Jann, from seeing the child—and New York law, at the time, gave Jamie that power. Had Jamie moved away with Jerome, Jann may not have learned that child welfare authorities had taken the child into state care as a result of abuse by Jamie’s boyfriend. Given Jamie’s hostility toward Jann, she would not likely have provided her name as a relative to notify.

Some state laws go farther and actually limit placement with those who are not legal relatives to individuals named by a parent. Massachusetts, for example, identifies an exclusive list of relatives entitled to kinship placement but has added to that list “a significant other adult to whom a child and the child’s parent(s) ascribe the role of family based on cultural and affectional ties or individual family values.”\textsuperscript{173} This, in essence, gives a parent veto power over a person who may have functioned as the child’s parent and may be the best alternative placement for the child. As parents attempting to exercise such veto power in post-dissolution custody and visitation cases have been largely rebuffed by state courts,\textsuperscript{174} they should not have such veto power in child welfare matters.

Even when the parent is supportive of a former partner’s involvement with the child, other relatives may pose an obstacle. The child’s grandparents and other close relatives have an undeniable role in the child welfare proceedings. Those individuals may be hostile to the parent’s sexual orientation and may deliberately seek to exclude a same-sex partner. In one Iowa case, a child removed based on her mother’s heroin use was placed with a grandmother rather than the mother’s non-substance-abusing wife, and when the agency returned the child to the wife seventeen months later

\textsuperscript{172} Paczkowski v. Paczkowski, 128 A.D.3d 968, 968 (N.Y. App. Div. 2015). In this case, Jann should have been considered Jerome’s legal parent and would have so qualified under the laws of several jurisdictions and under the Uniform Parentage Act (2017). I use this factual situation merely to illustrate that a parent’s hostility towards a former partner should not by itself keep that partner from designation as a relative.

\textsuperscript{173} 110 MASS. CODE REGS. 18.04 (2018) (emphasis added).

the grandmother contested that decision. Some state statutes actually facilitate such exclusion, such as that in Colorado where a nonrelative can be included if that person is “ascribed by the family as having a family-like relationship” with the child. If the child has a biological father, even if he has not raised the child, his view and that of his family will be included in the child welfare process and may be influenced by homophobia.

IV. Looking Ahead

This Article is a call to action. Both qualitative and quantitative research is critical to a better understanding of this particularly vulnerable group of LGBT parents and their children. Researchers who focus on LGBT families can pair with researchers who focus on parents in the child welfare system to develop the proper instruments for increasing our knowledge base.

LGBT advocacy and litigation groups do not need to wait for more research, however. They can take a number of steps to serve this population right now. The first critical step is simply identifying this cohort of LGBT parents as a constituency they serve and including them in action plans and priorities. For example, the Human Rights Campaign can expand its existing All Children All Families Project to encompass these children and these families. As part of this work, no agency that refuses to license LGBT foster or adoptive parents should be permitted to manage the cases of children in foster care whose parents are LGBT. The likelihood of bias is too great, and the stakes are too high. LGBT organizations are already fighting discrimination by these agencies, and they should make this explicit demand part of their work.

Legal groups should reach out to lawyers who focus on parents in the child welfare system, such as the American Bar Association National Alliance for Parent Representation and the network to which it is connected. Such a mutually beneficial arrangement will educate those who work on the front lines who simply may be unaware, for example, of developments in parentage law, while also funneling information back to the LGBT groups about where systemic advocacy is needed. They can

175. In the Interest of M.L., 908 N.W.2d 882 (Iowa Ct. App 2017). These facts are contained in the opinion even though not relevant to the legal issue on appeal in the case.
176. COLO. CODE REGS. § 2509-8:7.708.11; COLO. CODE REGS § 2509-1:7.000.2 (emphasis added).
177. The website for the ABA National Alliance for Parent Representation lists numerous national and local legal representation, training, and advocacy groups. See AM. BAR ASS’N, NAT’L ALLIANCE FOR PARENT REPRESENTATION, Partners in the Field, ambar.org, https://www.americanbar.org/groups/child_law/project-areas/parentrepresentation/professional-development/ (last visited Jan. 31, 2019).
also begin to identify, on a state level, where legislative or administrative advocacy is necessary to recognize the family status of partners and ex-partners who are not legal parents.

Several LGBT legal groups have longstanding, ongoing efforts at parentage law reform, both through litigation and legislation. Such reforms can create the law necessary to protect same-sex couples and their children in the child welfare context. Incorporating those changes into that context, however, may require additional education of the actors in state agencies and courts who interact with these families.

Finally, arguments in support of LGBT adoption and foster parenting should take into account the many longstanding critiques of the child welfare system. Discrimination against same-sex couples who want to adopt is wrong. But there are too many children in foster care, some of whom have LGBT parents. Joining the efforts to reduce those numbers by keeping more children with their families will benefit those parents and will align LGBT rights advocacy with work on behalf of racial and economic justice.
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, and a number of states have changed their statutes to be gender neutral. 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: California, Colorado, Connecticut, District of Columbia, Idaho, Illinois, Indiana, Maine, Massachusetts, Montana, New Jersey, New York, Oklahoma, Pennsylvania, Vermont.
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. 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.

Appellate courts in Alabama, Kansas, Kentucky, North Carolina, Nebraska, Ohio, and Wisconsin 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. Utah also gives a preference to married couples over any single adult in adoptions or foster care placement. Arizona gives a preference to married couples over a single adult in adoption placement. 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. 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. 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.

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. 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.”

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. Courts in a number of states, including appellate courts in Florida, Indiana, Kentucky, Minnesota, Texas, and Wisconsin have issued similar decisions. 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.” Only one of the many states that has considered this issue, North Carolina, has invalidated a final adoption.

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 Michigan, North Dakota, South Dakota, Virginia, Alabama, and Texas 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.

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. Delaware recognizes a person who is a \textit{de facto} parent as a legal parent under their parentage statutes. 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. 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, 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.

Some states, including Indiana, Maine, Nebraska, Pennsylvania, and Washington, 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 \textit{Marriage, Domestic Partnerships, and Civil Unions: An Overview of Relationship Recognition for Same-Sex Couples in the United States}, available at www.nclrights.org.

\textbf{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,” “\textit{de facto} parent,” “psychological parent,” or “\textit{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, Arkansas, Arizona, Colorado, Indiana, Kentucky, Maine, Massachusetts, Minnesota, Missouri, Mississippi, Montana, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Washington, West Virginia, and Wisconsin.

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.

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. 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.

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 be enforceable in court. 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 available at www.nclrights.org.

Last updated: March 2019

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.”).


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”).


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


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

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

12 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.”)
This fact sheet is intended to provide accurate, general information regarding legal rights in the United States. Because laws and legal procedures are subject to frequent change and differing interpretations, the National Center for Lesbian Rights cannot ensure the information in this fact sheet is current nor be responsible for any use to which it is put. Do not rely on this information without consulting an attorney or the appropriate agency.


34 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).

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


37 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).

38 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. . . .”)

40 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. . . .”)

41 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.”)

42 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. . . . ”)

43 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.”)

44 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 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).

47 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).


52 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.


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

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


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


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

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


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").

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

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


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


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

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

82 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”).

83 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.

84 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].