

## Same-Sex Married Couple Adoption: Better Safe Than Sorry

By Linda Torosian

New Jersey extended the right to marry to same-sex couples in 2013. In 2015, the U.S. Supreme Court recognized that same-sex couples have a constitutional right to marry. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The court's decision on same-sex marriage has also had an impact on adoption rights. Although *Obergefell* did not explicitly address adoption, some of the plaintiffs in the case raised adoption-related issues. The 2015 ruling explicitly recognized that adoption is one of the longstanding rights of marriage. *Id.* at 2601.

Despite the *Obergefell* decision and New Jersey's history of advancing the law to protect families of all configurations, there are various marriage-related issues same-sex couples, male or female, must consider. This article will address the reasons why same-sex female married couples should consider adoption by the non-biological parent, even though both are listed on the child's birth certificate and are already recognized as the child's parents.

Notably, the landscape was very different prior to the *Obergefell*



ruling. Although some states protected same-sex couples' right to adopt children, others expressly prohibited lesbians and gay men from adopting. By 2015, Mississippi was the only state that banned same-sex couples from adopting. However, the legality of Mississippi's law was challenged following the *Obergefell* ruling and in March 2016, a Federal District Court blocked Mississippi from enforcing its adoption ban against same-sex married couples, explaining that the Supreme Court "extended its holding to marriage-related benefits—which includes the right to adopt."

Despite the decision in *Obergefell*, same-sex married parents have been forced to petition the Supreme Court for confirmation of their parental rights. For instance,



in *Pavan v. Smith*, 137 S. Ct. 2075 (2017), the Supreme Court held that an Arkansas statute denied married same-sex couples access to the constellation of benefits that Arkansas linked to marriage, and thus was unconstitutional to the extent that the statute treated same-sex couples differently from opposite-sex couples. In *Pavan*, two married same-sex couples conceived children through anonymous sperm donation but were denied the right to have their spouse listed on the birth certificate. The Arkansas state law required the name of the mother's male spouse to appear on the child's birth certificate, regardless of his biological relationship to the child. The Arkansas Supreme Court ruled that the state did not have to extend that rule to similarly situated

same-sex couples. The Supreme Court reversed the decision because “that differential treatment infringes *Obergefell’s* commitment to provide same-sex couples the constellation of benefits that the States have linked to marriage.” *Id.* at 2077.

In *V.L. v. E.L.*, 136 S. Ct. 1017 (2016), the Supreme Court held that a Georgia superior court had subject-matter jurisdiction to hear and decide an adoption petition, which triggered the Alabama court’s full faith and credit obligation. A Georgia court entered a final judgment of adoption, which made V.L. a legal parent of the children she and E.L. had raised together from birth. Upon separating while living in Alabama, V.L. asked the Alabama courts to enforce the Georgia adoption judgment and grant her custody or visitation rights. The Supreme Court of Alabama ruled against her, holding that the Full Faith and Credit Clause of the United States Constitution does not require Alabama courts to respect a sister-state’s adoption judgment. The Supreme Court unanimously overturned the decision.

In New Jersey, when a same-sex female married couple has a child using artificial insemination of donor sperm under medical supervision, New Jersey law recognizes the non-biological parent as a parent pursuant to: (1) N.J.S.A. 9:17-44, the artificial insemination statute; and (2) N.J.S.A. 9:17-43, the marital presumption. Pursuant to N.J.S.A. 9:17-44, where the

statutory requirements are met, a non-biological parent is the legal parent of a child born as a result of the process. The statutory requirements include being artificially inseminated with donated semen, with a spouse’s consent, under the supervision of a licensed physician, physician assistant, or an advanced practice nurse (the “Physician”). The consent must be in writing, reflect the date of the insemination, signed by both parties, and certified to by the Physician. The donor of the semen provided to the Physician has no legal rights or duties stemming from the conception of the children and is not a legally recognized parent.

Pursuant to N.J.S.A. 9:17-43, a man is presumed to be the biological father of a child if he and the child’s biological mother are married to each other and the child is born during the marriage. As discussed above, in accordance with the decision of *Obergefell*, by proxy, a same-sex spouse is entitled to the same presumption, despite the statute using language such as “man” and “biological father.” Accordingly, a New Jersey birth certificate lists both intended parents, biological and non-biological, as the parents of a child. Instead of “mother” and “father” it notes “parent” and “parent.”

Unfortunately, outdated state laws controlling who can be a legal parent present obstacles for many LGBTQ couples who start a family. While things are beginning to change, the existence of differing



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state laws means that same-sex partners who are not the biological parent can be a legal parent at home but a legal stranger if they move or travel.

Thus while a New Jersey issued birth certificate identifying each intended parent and recognition by the state as a legal parent may be considered sufficient by most, it is highly recommended that non-biological parents confirm their parentage through an adoption, particularly when other jurisdictions are not as willing to protect the rights of all. Without an adoption decree, non-biological parents can find themselves in a lengthy and costly custody dispute if they move to a state that is not as protective of same-sex couples’ rights and separate from their partner. Another possible scenario involves simply vacationing in such a state and something happens to the biological parent. Without an adoption decree the non-biological parent may not be allowed access to their child in a hospital.

Birth Certificates are not proof of parentage; states are not required

to recognize documents created by agencies of sister states. Adoptions are court orders that all states are required to recognize pursuant to the Full Faith and Credit Clause of the Constitution. Therefore, every state must recognize an adoption by an LGBTQ parent even if that state's own laws would not have allowed the adoption to take place.

Recently, my wife adopted our daughter, despite being recognized as her legal parent and named as her parent on her birth certificate. While the process is not complicated, it is lengthy and can be frustrating and insulting at times, particularly since New Jersey courts recognize such confirmatory adoptions as "step-parent adoptions," although both the biological and non-biological parents are listed on the birth certificate.

The process begins with the non-biological parent or "stepparent" obtaining a criminal background check and child abuse clearance. Other adults, aside from the biological parent, who live in the residence are also required to obtain such clearances. As the parent—legal and psychological—of the child, the background check and clearance seem unnecessary and slighting. Nevertheless, it is a requirement, and awaiting the results is one of the more time consuming steps of the process. In our case, it took almost three months to obtain

the clearances. The background check is conducted upon submitting one's fingerprints, and the child abuse clearance requires completing a form which lists prior addresses since 1981. This step must be completed through a New Jersey licensed adoption agency.

Upon receipt of the clearances, you must forward the results to the Surrogate's Court. In the event that there is a record of criminal conviction or child abuse, the court may request a copy of the disposition of the case. The specific conviction will only be disclosed to the court, however, the court may order further investigation before the adoptive parent can be approved.

While awaiting the clearances, you may file the pleadings including the Verified Complaint for Adoption, copy of the marriage certificate, proof of legal residence if not a citizen, consent of the birth mother, affidavits of the birth mother and petitioner attesting to the artificial insemination, proposed Order for Preliminary and Final Hearing, and a Final Judgment of Adoption.

Upon receipt of the clearances and required pleadings, the court will schedule a final hearing which both petitioner and birth mother are required to attend. Typically, the Order for Preliminary and Final Hearing must be served upon

the other birth parent, but because in this type of scenario the child is conceived through donor sperm insemination and the identity of the father is unknown, service upon the birth father is waived, along with a separate final hearing. Also, since the petitioner's name already appears as a parent on the birth certification, a revised birth certificate is not necessary as in other stepparent adoptions. For us, the whole process—from filing out the forms and getting fingerprinted in order to obtain the required clearances to obtaining a Final Judgment of Adoption—took approximately seven months. However, the piece of mind we now have when it comes to our family and my wife's rightful recognition as our child's parent, regardless of where we go, is well worth the proverbial hoops we jumped through to obtain same.

In sum, given today's mobility and political climate, to ensure one's parental rights are protected across the country, it is best for non-biological LGBTQ parents to adopt their children, thereby ensuring another layer of legal protection.

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