

A Solomon Like Decision: Factors In Determining Child Custody for Same Sex Couples in Florida After Dissolution of a Relationship or Marriage

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A SOLOMON LIKE DECISION: FACTORS IN DETERMINING CHILD
CUSTODY FOR SAME SEX COUPLES IN FLORIDA AFTER DISSOLUTION
OF A RELATIONSHIP OR MARRIAGE

by

SYDNEY B. ALEXANDER

A thesis submitted in partial fulfillment of the requirements
for the Honors in the Major Program in Legal Studies
in the College of Health and Public Affairs
and in The Burnett Honors College
at the University of Central Florida
Orlando, Florida

Spring Term 2015

Thesis Chair: Dr. Kathy Cook

ABSTRACT

Same sex couples around the nation have continually fought for their right to marry and in thirty-six states they have been given that right. What same-sex couples did not think to fight for was the right to divorce. There has been a considerable lack of focus on one such issue often left out of the public discourse over marriage equality: determining parental rights for the purposes of child custody/visitation in the context of a homosexual relationship that has broken down. The choice to have a child in a same-sex couple, with the exception of adoption, usually only allows for one parent to serve as the biological parent to the child. These options include: surrogacy, in vitro fertilization, and artificial insemination. What that means is that it leaves the other parent as the nonlegal and nonbiological parent in which they would be given no rights to the child if the relationship were to dissolve.

After looking at many cases in Florida, the courts place a significant emphasis on biology in determining child custody in dissolution of marriage or relationship proceedings. In this thesis, we offer solutions in order to allow same-sex couples the equal parental rights they deserve even when they are not the biological parent of the child. Florida statutes have not been updated to reflect the changes in the law such as the recognition of same-sex marriage and the right for same-sex couples to adopt. Although restrictions on adoption and same sex marriages have been found unconstitutional, the implications of these changes in the law regarding custody and parental rights have not changed. Once the proposed solutions have been adopted, same-sex couples will be able to dissolve their relationships and marriages without fear of losing the custody and/or visitation rights to their child while still applying the best interest of the child standard used in heterosexual dissolution of marriage cases.

DEDICATION

For the same-sex divorced parents looking for a solution in custody related battle.

ACKNOWLEDGMENTS

I wish to sincerely thank all of those individuals who made this thesis possible:

To my thesis chair, Dr. Kathy Cook, thank you for your constant guidance and support throughout over the four years. You have challenged me every day to be the best person and student I could be. This thesis would have been impossible without you pushing me every step of the way.

Dr. Gina Naccarato-Fromang and Deborah Weaver, thank you both for serving on my committee. You have both touched my life in and out of the classroom and I cannot thank you enough for the support and words of encouragement you have given me throughout the process.

To my family, Mom, Dad, and Elexis, thank you for always supporting me in everything I put my mind to when I know it's going to be a challenging journey. Thank you for reminding me every day to reach my fullest potential. Thank you for raising me into the woman I am today.

To all of my friends, family, and professors, thank you for continuing to stand by my side, and for your continued encouragement throughout the entire thesis writing process. I definitely could not have done this without the amazing support system that each of you have provided me with over the years.

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INTRODUCTION

The nation is engaged in a debate over whether to grant same-sex couples the rights and privileges of marriage. Supporters of marriage equality flood the media with images of same-sex couples simply wanting the chance to say their “I dos” and how they wish to have the state formally recognize their shared love and commitment for one another. The Defense of Marriage Act (DOMA) passed by Congress in 1996 and signed into law by President Bill Clinton gave states permission to refuse to recognize marriages entered into by same-sex couples in other jurisdictions and defined marriage as a man and a woman. Since then, DOMA has been appealed. Thirty-seven states, District of Columbia, and some counties in Missouri, have legalized same sex marriage, while thirteen states have a ban on same sex marriage.¹

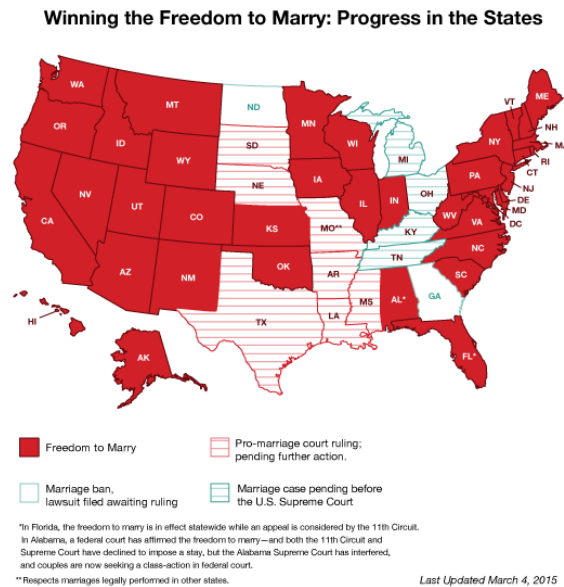


FIGURE 1: FREEDOM TO MARRY IN THE UNITED STATES

¹ Freedom to Marry, Inc.

In 2008, Florida voters approved the Constitutional Amendment that banned both same-sex marriage and civil unions. The Amendment explicitly reads, “For purposes of interpreting any state statute or rule, the term “marriage” means only a legal union between one man and one woman as husband and wife, and the term “spouse” applies only to a member of such a union.”² However, many believe that this provision was unconstitutional under the United States Constitution. As a result, on January 6, 2015, the freedom to marry for homosexual couples was legalized statewide in Florida by a federal court decision after Judge Hinkle declared the ban on same sex marriage unconstitutional on August 21, 2014. The U.S. District Court Judge Hinkle of Tallahassee ruled in favor of the LGBT right group SAVE and the eight same sex couples.

Whether the marriage is recognized or not by the states, the unfortunate reality is that many homosexual relationships, like heterosexual relationships, break up. Marriage rights play as important a role at a relationship’s dissolution as they do at a relationship’s inception. There has been a considerable lack of focus on one such issue often left out of the public discourse over marriage equality: determining parental rights for the purposes of child custody/visitation in the context of a homosexual relationship that has broken down. Those couples that have separated or divorced have other challenges to face concerning child support, custody, and visitation and under certain circumstances, whether the state they live recognizes their rights as parents. Even if the relationship is recognized, there may be issues because custody is often tied to genetic and biological relationships. The term “biological” is critical in the current determination of custody in heterosexual parents and crucial in the application of the law, but it is time to draw a clear and

² § 741.212, Fla. Stat. (2012).

fine line to seek equality for same sex parents in this debate. The issue of gay divorce is an often-overlooked issue for the fight of marriage equality; it doesn't just end for the legality of marriage.

The story of King Solomon tells a biblical narrative in which two women came to him claiming to be the mother of a infant boy. Solomon said that he would cut the baby in half in order to give each of them a part of him. One of them women agreed and the other woman cried out to just give the baby to the other woman and begged the King not to kill him. Solomon then handed the baby over to the woman who was screaming at him not to do it because by using his judgment and wisdom he knew the real mother would not allow that to happen to her son.³ Using the ability to judge fairly, it is now up to the states, including Florida, to find the factors for determining parentage and related issues. These should take into consideration how the children were conceived, the legal relationship of the couple, and any formalized agreements. The definition of parentage will determine what will happen when a homosexual couple with children dissolves their marriage or relationship.

This issue is one not many have considered because much of the focus in the news is the fight for recognition of marriage rather than what comes after—divorce or dissolution of the relationship. Figure 2 below shows that over 94,000 households have children with same-sex couples in the United States.

³ 1 Kings 3:16-28

Households with Children in the U.S.			
	Married opposite-sex couples	Unmarried opposite-sex couples	Same-sex Couples
Households with Children	22,872,151	2,267,016	94,627
Biological Only	90.80%	88%	72.80%
Step only or adopted only	4.40%	5.20%	21.20%
Combination	4.80%	6.80%	6%

*Chart taken from the Florida Partnership Law Blog/ data from 2012 U.S. Census Bureau

FIGURE 2: HOUSEHOLDS WITH CHILDREN IN THE U.S.

Additionally, it shows that 72% are biological, which raises the most important question about biological parentage. It is very likely that only one parent is the biological one and when the homosexual couples dissolves their relationship, they will be facing a battle that Florida Statutes and laws have yet to address.

This thesis will look at state laws and make recommendations for Florida law specifically to address the issues of custody and parental rights and obligations in cases where homosexual marriages have dissolved. Custody in this thesis includes all parental responsibility and residence issues. This includes physical custody, parental rights or responsibilities, time-sharing, and visitation. It is important to clarify custody rights since any method of conception or adoption should give the homosexual couples opportunities to have the same rights as biological mothers and fathers in a marriage today.

Through research, the thesis will answer several questions, including but not limited to the following:

- Can Florida's Child Custody Statutes be applied to homosexual couples?
 - Does Florida law have a presumption of parentage statute that could allow homosexual relationships with children to be recognized?
 - Does Florida's recognition of homosexual marriages address issues of marriage when custody is contested?
- How are other states applying child custody statutes to homosexual couples?
- How should courts apply child custody laws to homosexual couples whose relationships dissolve in Florida?
- Can legal parentage be based upon homosexual couples' intent to raise a child?
- Can changes be made to the birth certificate as a legal document to allow for homosexual parents?

To answer these questions, the thesis will first examine the existing child custody statutes for Florida, and other states. Then, the thesis will examine case law in which court decisions have been made regarding child custody in homosexual relationships.

CHILD CONCEPTION IN SAME SEX COUPLES

The mechanics of conception, pregnancy, and birth for same sex couples require some kind of assisted reproductive technology to have a child together. Same-sex couples agree to a couple different scenarios to have a child together—medically assisted insemination, in vitro fertilization (IVF), surrogacy, or adoption. Medically assisted insemination, artificial insemination, is the process in which a sperm bank usually anonymously picks a sperm donor to conceive the child, while there are other cases in which couples turn to a friend or relative.⁴ This method is used for lesbian couples. IVF is the process of manually combining an egg and sperm outside of the body, in a laboratory dish. One women may contribute the egg while the other carries the pregnancy. Gay men use surrogacy in which another women gives birth to a baby that the couple could not have had on their own. In this case, a gay male couple can chose to inseminate with one of the father’s sperm or they leave the genetic fatherhood up to chance by mixing their sperm to then be considered biological. There are two forms of surrogacy: traditional and gestational. In traditional surrogacy the woman who carries the baby to term is also the genetic mother. Gestational surrogacy uses an egg from a donor, rather than the surrogate.⁵ In some cases of medical insemination, in vitro, and surrogacy, only one parent can serve as the biological half of the equation; therefore, the other parent has no biological or legal ties to the child they raise. This brings up another issue: if there is no biological connection to one of the partners in the same sex marriage to the child, and if the homosexual relationship dissolves, does that partner have any right to child custody of the child they raised together?

⁴ S.C., The Economist, How Same-Sex Couples Have Children

⁵ S.C., The Economist, How Same-Sex Couples Have Children

Adoption Florida does not speak to this issue and neither do states in which same sex marriage is legalized. For years courts have leaned toward maternal preference in terms of custody, but what happens when both are women and in some cases in which neither is a women?

Surrogacy

The number of surrogacy agreements is on the rise, reflecting the desperation of many same-sex couples seeking to create families. Governor Jerry Brown of California signed a law in September 2012 setting out guidelines for gestational surrogacy agreements; New York lawmakers have proposed a similar bill. Connecticut last year enacted a law allowing same-sex couples to be named as parents on the birth certificates of children born to surrogates. The section of Florida law that permits gestational surrogacy procedures is Florida Statue 742.15. This law states that a couple wishing to enter into such an arrangement must sign an agreement with a gestational surrogate to carry a child. It is important to note that Florida does not permit compensation for surrogacy. Also, the current statue only allows lawfully married couples to enter into an agreement with a surrogate; however, it is possible for LGBT couples in Florida to still expand their family through surrogacy. They can still arrange for a gestational carrier through a Pre-Planned Adoption Agreement under Florida statute.

The gay or lesbian couple makes an arrangement with a surrogate, using "donor" eggs of the intended mother(s) or the sperm of the intended father(s). One partner is designated as the

parent on the birth certificate. After the surrogate relinquishes her parental rights, the non-biological partner goes to court to establish parental rights through a second-parent adoption.⁶

Florida statues 742.16 expedited affirmation of parental status for gestational surrogacy, explains the process in which the commissioning couple becomes the legal parents of the surrogate child.

(6) The commissioning couple or their legal representative shall appear at the hearing on the petition. At the conclusion of the hearing, after the court has determined that a binding and enforceable gestational surrogacy contract has been executed pursuant to s. 742.15 and that at least one member of the commissioning couple is the genetic parent of the child, the court shall enter an order stating that the commissioning couple are the legal parents of the child.

(7) When at least one member of the commissioning couple is the genetic parent of the child, the commissioning couple shall be presumed to be the natural parents of the child.

(8) Within 30 days after entry of the order, the clerk of the court shall prepare a certified statement of the order for the state registrar of vital statistics on a form provided by the registrar. The court shall thereupon enter an order requiring the Department of Health to issue a new birth certificate naming the commissioning couple as parents and requiring the department to seal the original birth certificate.

(9) All papers and records pertaining to the affirmation of parental status, including the original birth certificate, are confidential and exempt from the provisions of s. 119.07(1)

⁶ Eskin, "Surrogacy Law." *Florida : A Safe Haven*

and subject to inspection only upon order of the court. The court files, records, and papers shall be indexed only in the name of the petitioner, and the name of the child shall not be noted on any docket, index, or other record outside the court file.⁷

It is important to note that a new birth certificate is created after the commissioning couple becomes the legal parents. A new birth certificate is created with the names of both parents even though one only needs to be the genetic parent to legalize the surrogacy.

In Vitro Fertilization/Artificial Insemination

In Vitro Fertilization as described previously is one assisted reproductive technology (ART) commonly referred to as IVF. IVF is the process of fertilization by manually combining an egg and sperm in a laboratory dish, and then transferring the embryo to the uterus.⁸

In November 2013, the Supreme Court of Florida was presented with a case in which two women, *T.M.H.* and *D.M.T.*, had a child together using funds from a joint bank account, paid a reproductive doctor to withdraw ova from *T.M.H.*, and implant the fertilized ova into *D.M.T.* After raising the child together, the relationship dissolved and *D.M.T.* is requested sole parental guardianship on the grounds that she is the biological mother. In the case of *T.M.H. v. D.M.T.*, the Florida Supreme Court ruled the following:

We conclude that the statute is unconstitutional (1) as a violation of the Due Process Clause of the United States Constitution and separately as a violation of the Due Process Clause and privacy provision of the Florida Constitution; and (2) as a violation of

⁷ § 742.16, Fla. Stat. (2011).

⁸ Definition by the Mayo Clinic

the federal Equal Protection Clause and separately as a violation of the Florida Equal Protection Clause. In reaching our conclusion, we rely on long standing constitutional law that an unwed biological father has an inchoate interest that develops into a fundamental right to be a parent protected by the Florida and United States Constitutions when he demonstrates a commitment to raising the child by assuming parental responsibilities. It is not the biological relationship per se, but rather ‘the assumption of the parental responsibilities which is of constitutional significance.’⁹

The case was remanded to trial court to determine the outcome based on the best interest of the child. The case uses the terms birth mother and biological mother to refer to the two women. The birth mother who carried the baby and gave birth was *D.M.T.* and the biological mother who donated the ova was *T.M.H.* The question was whether section 742.14, which is Florida’s assisted reproductive technology statute, is applicable to the circumstances presented. The court decided that the statute did not apply to *T.M.H.*, the biological mother, in this situation because she is not a “donor” as in the terms of the statute, since she had the intention of raising the child with *D.M.T.* at the conception and at the birth of the child, and was a mother to the child several years later. The case would then consider the two a “commissioning couple” and meet the exception of the statute.

Here, it is undisputed that [the biological mother] formed and maintained a parental relationship for several years after the child was born, and she did so as an equal parental partner with [the birth mother] who, for all that time, never suggested that [the biological

⁹ *Matter of Adoption of Doe*, 543 So. 2d 741, 748 (Fla. 1989).

mother] had relinquished her parental rights to her child. We believe that [the biological mother] has constitutionally protected rights as a genetic parent who has established a parental relationship with her genetic offspring that transcend the provisions of section 742.14.¹⁰

This case is particularly important to reference as a precedent case for this issue because it was in favor of both partners in the relationship due to this assumption of parentage that places no emphasis on the biological parent. Both the women raised the children together for a number of years and therefore, the Court does not give the biological factor any more weight than just being considered the birth mother. One of the concepts that the courts could have used, but did not was the concept of estoppel. Since the parties were both present, they cannot deny a situation that they have then created. Florida Statute 742.11 defines the status of parentage after the IVF and artificial insemination process. It reads as follows:

Presumed status of child conceived by means of artificial or in vitro insemination or donated eggs or pre-embryos. —

(1) Except in the case of gestational surrogacy, any child born within wedlock who has been conceived by the means of artificial or in vitro insemination is irrefutably presumed to be the child of the husband and wife, provided that both husband and wife have consented in writing to the artificial or in vitro insemination.

¹⁰ T.M.H v. D.M.T. 129 So. 3d 320, Fla. 2013

(2) Except in the case of gestational surrogacy, any child born within wedlock who has been conceived by means of donated eggs or pre-embryos shall be irrefutably presumed to be the child of the recipient gestating woman and her husband, provided that both parties have consented in writing to the use of donated eggs or pre-embryos.¹¹

The second exception involves gestational surrogacy and involves a third party who gains some rights during the process of IVF. This case involves only the two parties and whether it is a married couple or just a same sex couple, a third party has not acquired any rights that would impact him or her or the best interest of the child. This exception only applies to male same sex relationships. This is important because there is a third party who is carrying the child who gains certain rights. IVF can be within the couple or outside the couple. The gestational surrogacy issue only comes into play when you have a third party that is bearing the baby and for example, a father, a father, and a birth mother.

Reading those statutes, something particular stands out right away—the husband and wife references. Florida statutes do not speak to situations in which a wife and wife and a husband and husband will be the parents of the child. Now that same sex marriage is legal in Florida, those changes need to be made in statues for correct application of the law.

¹¹ § 742.11, Fla. Stat. (2011)

SAME-SEX ADOPTION

Only three states in the nation have had explicit laws that prohibit a homosexual couple or a homosexual individual from adopting. Those states include: Florida, Mississippi, and Utah. A method in which others states get around not explicitly stating that same-sex couples cannot adopt is by requiring that only married couples can adopt. Therefore, they avoid same-sex couples in their state from adopting only if the couple's marriage is not recognized. When adopting, it is so important that both parties are listed as the adopting parents to avoid a lengthy custody battle in the future. The Florida adoption statutes under the Florida Adoption Act read as follows:

63.042 Who may be adopted; who may adopt. —

- 1) Any person, a minor or an adult, may be adopted.

- (2) The following persons may adopt:
 - (a) A husband and wife jointly;

 - (b) An unmarried adult; or

 - (c) A married person without the other spouse joining as a petitioner, if the person to be adopted is not his or her spouse, and if:
 1. The other spouse is a parent of the person to be adopted and consents to the adoption; or

2. The failure of the other spouse to join in the petition or to consent to the adoption is excused by the court for good cause shown or in the best interest of the child.

(3) No person eligible to adopt under this statute may adopt if that person is a homosexual. [Emphasis added]

(4) No person eligible under this section shall be prohibited from adopting solely because such person possesses a physical disability or handicap, unless it is determined by the court or adoption entity that such disability or handicap renders such person incapable of serving as an effective parent.

Section 3 of Florida Statute 63.042 clearly states that no person may adopt if they identify themselves as a homosexual. This law was challenged in 2007 by the case *Florida Department of Children and Families v. X.X.G. and N.R.G.*¹²

The trial began on October 1, 2008, and lasted for four days. F.G. presented fact witnesses as well as expert witnesses who testified regarding homosexual and heterosexual parenting capabilities by showing that there was no difference in the outcome of the childhood experience or negative impact. In opposition, the Department offered the testimony of two expert witnesses. The trial court rendered a 53-page judgment declaring subsection 63.042(3) unconstitutional and granting the petition for adoption. The trial court found, among other things,

¹² *Florida Department of Children and Families v. X.X.G. and N.R.G.*, 43 So. 3d 79 (3rd DCA 2010)

that the statute violates the equal protection rights of F.G. and the children that are guaranteed by Article I, Section 2 of the Florida Constitution.

In September of 2010, that changed with the case of Florida Department of Children and Families v. X.X.G. and N.R.G. The question in the case was whether the adoption should have been denied because F.G. is a homosexual. Under Florida law, a homosexual person is allowed to be a foster parent. F.G. had successfully served as a foster parent for the children since 2004. According to the judgment, “Florida is the only remaining state to expressly ban all gay adoptions without exception.” Judge Cindy Lederman, after lengthy hearings, concluded that there is no rational basis for the statute. In 2007, F.G. filed a petition in the circuit court to adopt the children. F.G. asked the court to find subsection 63.042(3) unconstitutional because it violates his rights to equal protection, privacy, and due process. Independent counsel acting on behalf of the children asserted that the children's rights to equal protection and due process had also been violated. The Department filed a motion to dismiss, but the court only dismissed the privacy claim.

This case was a milestone for Florida’s homosexual couples. It gave foster parents the opportunity to adopt the children they have been raising and gave those couples looking to adopt their own children the option to do so now that the statute has been deemed unconstitutional. Although, this case does create precedent for same sex couples and the right to adopt, the statute currently still remains the same above; therefore, still allowing some courts, depending on the

judge, to deny same sex couples the right to adopt children¹³. The courts have declared the right for same sex couples to adopt and Florida statutes should be updated immediately to bind the courts to that decision.

Second-Parent Adoption

Since the ban was lifted in 2010, hundreds of gay non-married couples have adopted children through second-parent adoptions. A second parent adoption (also called a co-parent adoption) is a legal procedure that allows a same-sex parent, regardless of whether they have a legally recognized relationship to the other parent, to adopt her or his partner's biological or adoptive child without terminating the first parent's legal status as a parent. Without second parent adoption, the non-biological parent has no legal rights to the child. Second parent adoptions are how gay and lesbian couples until January 6, 2015 have been able to raise a non-biological a child together in Florida.¹⁴ One way to think about a second parent adoption is that it's a stepparent adoption for gay couples. The difference is in procedure: there is more paperwork for a second parent adoption, and one is required to get a home study (just like in a single adoption). The end result however, is the same: both partners will be the legal parents of their child. The process has three parts:

1. Home study
2. Petition with the court

¹³ Subsequently to writing this, the State of Florida passed CS/HB 7013 to amend the Florida Statute, but it is not final as of the time of this thesis.

¹⁴ Alpher, Florida Gay Adoption

3. Hearing with the judge

Once the second parent adoption is completed, a new birth certificate is issued by Florida showing the names of the new legal parents. The question is, does it have to be this difficult?

Throughout Florida, the most common parties to a second parent adoption in Florida are lesbian couples where one partner is the biological parent. When second-parent adoption is permitted, it gives the second parent the full legal rights and responsibilities of parenthood so that, in a custody determination, each parent would have a comparable basis for requesting custody or visitation.¹⁵ Other people that use second parent adoptions include:

- Gay male couples where a surrogate mother has given birth to a child using one of the men's sperm.
- Couples where one partner has previously adopted a child on his or her own.
- Couples where one partner has a biological child with a previous relationship, and the other biological parent has given up his or her parental rights.

Step-parent Adoption

Step-parent adoptions are common when one biological parent is willing to give up his/her parental rights to a step-parent. After adoption, the step-parent has all rights and responsibilities of the biological parent. In step-parent adoptions, as with all other adoptions, if

¹⁵ Haney-Caron and Heilbrun, *Lesbian and Gay Parents and Determination of Child Custody: The Changing Legal Landscape and Implications for Policy and Practice*

the child is twelve years of age or older, he or she must give his/her consent to the adoption and must be interviewed prior to signing the consent.¹⁶ Now that same-sex marriage has been legalized in Florida, more and more families will be turning to stepparent adoption instead of second-parent adoption. This form of adoption is an extra precaution to protect their rights as parents.

Already, several same-sex couples in Orlando have successfully completed step-parent adoptions, which don't require background checks, fingerprints or home studies. They typically cost several thousand dollars less than second-parent adoptions, are less intrusive and shave months off the time it takes to complete an adoption.

For married gay couples adopting children out of the foster care system, the process is about to become easier still. A week after gay marriage became legal, Florida's Department of Children and Families distributed a memo essentially instructing community-based care agencies that married same-sex couples can now adopt children jointly, rather than having one partner adopt the child and the other partner go through a second-parent adoption.¹⁷ Although step-parent adoption is available, one cannot assume that all gay couples will get their relationship legally recognized through marriage. Therefore, second-parent adoption will still come into play when same sex couples who have not legalized their relationship through marriage in Florida,

¹⁶ www.floridabar.org

¹⁷ Seeking to Adopt in Florida: Lesbian and Gay Parents Navigate the Legal Process, *Journal of Gay & Lesbian Social Services*

want both parties to become legal parents of their children. Without being recognized as the legal parent of a spouse's child, the nonlegal stepparent ultimately has no parental rights.¹⁸

ALTERNATIVE SAME-SEX PARENT RECOGNITION

De facto Parenthood

In cases in which the same-sex couple is not able to or does not acquire a second-parent adoption, an alternative approach has been taken by some courts to protect the parent-child relationship for both parents on dissolution of the partnership. The nonlegal parents may be given rights as a “de facto,” “psychological parent,” or commonly referred to as “loco parentis.” A de facto parent is defined by someone who has been found by the court to assume the day-to-day basis duties of a parent by fulfilling their physical and psychological need for a substantial period of time. In other states, such as New Jersey and Massachusetts, the de facto parent has been recognized; Florida precedents are not very encouraging for the party seeking recognition and parental rights. In Florida, the case of *Kazmierazak v. Query*¹⁹ the appellant argued that she was entitled to an evidentiary hearing to establish that she was a “psychological parent” of appellee’s biological child. As a psychological parent, she contends that she deserves parental status equal to the biological mother to seek custody or visitation over the biological mother’s objection. The court rejected the argument that the psychological parent has standing to pursue custody or visitation of another person’s adoptive or biological child. This is one of many cases

¹⁸ Neufeld, Greenspoon Marder Law, *Daily Business Review*

¹⁹ *Kazmierazak v. Query*, 736 So. 2d 106 Fla: Dist. Court of Appeals, 4th Dist. 1999

in which Florida does not favor the de facto parent and continues to emphasize the biological parent.

A Massachusetts case of *E.N.O v. L.L.M.*, the court decided in the case of a de facto parent and biological parent.

The judge applied the "best interests of the child" standard, noting "children born to parents who are not married to each other are to be treated in the same manner as all other children." See G. L. c. 209C, § 1. The judge viewed several facts as significant. He found that the decision to have the child was made jointly by the plaintiff and the defendant. After the child's birth, the plaintiff had daily contact with the child and "acted in the capacity [of] his other parent in all aspects of his life." The judge further observed that the plaintiff and the defendant "at all times referred to each other as [the child's] parents." In addition, the judge stated, without further description, that the plaintiff was "listed on all contracts and applications as [the child's] parent."²⁰

The Massachusetts Supreme Court looked at the following factors

- (a) the legal parent fostered a parent-like relationship between the third party and the child
- (b) the third party and the child lived together in the same home
- (c) the third party assumed the responsibilities of parenthood, and

²⁰ *ENO v. LMM*, 429 Mass. 84 Supreme Judicial Court (1999).

(d) the third party has actually created with the child a parent-like bond.²¹

In different case in the state of Massachusetts, *C.M. v. P.R.*²² the court did not apply the concept of de facto parent because the plaintiff had not been part of the decision to create a family by bringing the child into the world. The court's decision in the case could be questioned because although he was not there in the creation of the child, the child still considers him a father figure. Factors important to custody usually consider the roles of the parties. Since he had been there since the birth of the child and was involved in the physical and psychological needs for a long period of the child's lifetime, the court could have looked at the best interest of the child and legally recognized the de facto parent.

²¹ Haney-Caron and Heilbrun, Lesbian and Gay Parents and Determination of Child Custody: The Changing Legal Landscape and Implications for Policy and Practice

²² *C.M. v. P.R.*, 420 Mass. 220 (1995)

DISSOLUTION OF MARRIAGE FOR HETEROSEXUAL COUPLES

To decide how homosexual dissolution of marriage and custody proceedings should be resolved, it is important to fully understand the heterosexual couple dissolution procedures and law. In dissolution of marriage in Florida, the Florida Statutes and the Florida Family Law Rules of Procedure govern all matters. Florida is a no fault divorce state. Generally, the only requirement to dissolve a marriage is to prove that your marriage is “irretrievably broken.” Either spouse can file for dissolution and then must prove: 1. The marriage exists, 2. One party has been a Florida resident for six months immediately preceding the filing of the petition, and 3. The marriage is irretrievably broken. This thesis will consider the procedures and matters related to support briefly since the scope of this thesis is limited to custody; support and other parental issues are only decided upon following the custody/residential issues.

The following forms are required to be filed in dissolution of marriage case with dependent or minor children:

- 12.901(b)(1): Petition for Dissolution of Marriage with Dependent or Minor Child(ren)
- 12.902(b) or (c): Family Law Financial Affidavit.
- 12.902(d): Uniform Child Custody Jurisdiction Act (UCCJA) Affidavit
- 12.902(e): Child Support Guidelines Worksheet
- 12.902(j): Notice of Social Security Number
- 12.912(b): Nonmilitary Affidavit (if there is a default judgement)
- 12.932: Certificate of Compliance with Mandatory Disclosure

The choices for child custody and residence after dissolution of marriage include:

- Shared Parental Responsibility
- Sole Parental Responsibility
- Rotating Custody
- Primary Residential Responsibility
- Secondary Residential Responsibility
- Reasonable Visitation
- Specified Visitation
- Supervised Visitation
- No contact

Best Interest of the Child

A Florida family court will establish custody arrangements using the standard of best interests of the child. In child custody cases, courts will look to the best interests of a child to maintain visitation/custody rights only with the child's biological parent, not third parties. However, with a same-sex couple, it is inevitable that one parent will not be the biological parent. Thus, when that parent is not recognized, that parent will be viewed as a third party and lose all visitation/custody rights if the couple separates. It should not be about the dispute of the partners; it should be what is going to be best for the children once their parents have dissolved their relationship. It is the tiebreaker when biology is on your side. Section 61.13(3), Florida Statutes outlines all the factors that will be evaluated to determine *best interest of the child*; they include but are not limited to:

(a) The demonstrated capacity and disposition of each parent to facilitate and encourage a close and continuing parent-child relationship, to honor the time-sharing schedule, and to be reasonable when changes are required.

(b) The anticipated division of parental responsibilities after the litigation, including the extent to which parental responsibilities will be delegated to third parties.

(c) The demonstrated capacity and disposition of each parent to determine, consider, and act upon the needs of the child as opposed to the needs or desires of the parent.

(d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(e) The geographic viability of the parenting plan, with special attention paid to the needs of school-age children and the amount of time to be spent traveling to effectuate the parenting plan. This factor does not create a presumption for or against relocation of either parent with a child. (f) The moral fitness of the parents.

(g) The mental and physical health of the parents.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.

(j) The demonstrated knowledge, capacity, and disposition of each parent to be informed of the circumstances of the minor child, including, but not limited to, the child's friends, teachers, medical care providers, daily activities, and favorite things.

(k) The demonstrated capacity and disposition of each parent to provide a consistent routine for the child, such as discipline, and daily schedules for homework, meals, and bedtime.

(l) The demonstrated capacity of each parent to communicate with and keep the other parent informed of issues and activities regarding the minor child, and the willingness of each parent to adopt a unified front on all major issues when dealing with the child.

(m) Evidence of domestic violence, sexual violence, child abuse, child abandonment, or child neglect, regardless of whether a prior or pending action relating to those issues has been brought. If the court accepts evidence of prior or pending actions regarding domestic violence, sexual violence, child abuse, child abandonment, or child neglect, the court must specifically acknowledge in writing that such evidence was considered when evaluating the best interests of the child.

(n) Evidence that either parent has knowingly provided false information to the court regarding any prior or pending action regarding domestic violence, sexual violence, child abuse, child abandonment, or child neglect.

(o) The particular parenting tasks customarily performed by each parent and the division of parental responsibilities before the institution of litigation and during the pending

litigation, including the extent to which parenting responsibilities were undertaken by third parties.

(p) The demonstrated capacity and disposition of each parent to participate and be involved in the child's school and extracurricular activities.

(q) The demonstrated capacity and disposition of each parent to maintain an environment for the child which is free from substance abuse.

(r) The capacity and disposition of each parent to protect the child from the ongoing litigation as demonstrated by not discussing the litigation with the child, not sharing documents or electronic media related to the litigation with the child, and refraining from disparaging comments about the other parent to the child.

(s) The developmental stages and needs of the child and the demonstrated capacity and disposition of each parent to meet the child's developmental needs.

(t) Any other factor that is relevant to the determination of a specific parenting plan, including the time-sharing schedule.²³

These same factors should also be used in custody and parenting proceeding of same sex couples.

²³ § 61.13, Fla. Stat. (2014)

NONBIOLOGICAL PARENTS FATE

Co-Parenting Agreements

Many same-sex couples in the past have created “co-parenting agreements” or “parenting plans” to help the nonlegal parent feel more comfortable and safe in the relationship with the child. Although that might help internally, if the couples do not remain together, the courts have considered these agreements non-binding. The case below is the perfect example of how the courts favor biological parentage when it comes down to the dissolution of a relationship between same-sex couples.

In the case of *Wakeman v. Dixon*, 921 So. 2d 669 is the perfect example of the use of co-parenting plans that left no binding legal protection for the nonbiological parent after the dissolution of the same-sex relationship. In *Wakeman v. Dixon*, the couple entered into a sperm donation agreement and decided that the child will be born to Dene B. Dixon and Mary L. Wakeman and that *Wakeman* would serve as the “Co-Parent.” *Dixon* became pregnant and after the birth of the child, *Wakeman* and *Dixon* entered into another agreement in which each party acknowledged the decision to conceive was a “joint decision” and in this co-parenting agreement, *Wakeman* agreed to contribute to the financial support of the child and both parties indicated their intent to “equally share in providing the child with support.” Although *Wakeman* is not the biological parent, both parties agreed that she would be the de facto parent who has participated in all phases of pre-natal care, and who plans to provide for the child a stable environment. The co-parenting agreement also provided that if the parties no longer resided together, they would continue to facilitate a close relationship with the other. *Dixon* executed a

pre-need designation of guardianship by naming *Wakeman* as the guardian of the child and a medical and dental consent form whereby *Wakeman* was granted authority to make decisions regarding the child's medical and dental health. *Dixon* became pregnant through another sperm donation agreement, and an identical co-parenting agreement was executed.

In 2004, the couple separated. *Dixon* relocated in Florida with the two children. *Wakeman* alleged that she has had no personal contact with the children and not spoken to them since a month after they separated. *Wakeman* filed a complaint against *Dixon* for breach of contract, breach of fiduciary duty, residency and child support, and declaratory judgment. *Wakeman* was seeking a declaration of parental rights and *Dixon* moved to dismiss the complaint by arguing that *Wakeman* has no enforceable legal rights regarding the children. The trial court granted the motion and ruled that under Florida statutory and case law, it possessed no authority to compel visitation between a child and a person who is not a parent. On appeal, *Wakeman* argued that the under the co-parenting agreements she had been granted the status of a parent; never the less the trial court considered her a third party, similar to a grandparent. According to the Florida Supreme Court, a person cannot be granted by statute the right to visitation with minor children, absent evidence of a demonstrable harm to child, such a grant would interfere with the natural parent's privacy and right to rear the child.

To prevent cases like this from happening, couples should secure their parentage through second-parent adoption or stepparent adoption. Adoption is a legally binding contract in which the birth certificate of the child is recreated to have the names of both of the partners names on it.

UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

The National Conference of Commissioners on Uniform State Laws created the Uniform Child Custody Jurisdiction and Enforcement Act upon the principles that “1) establish jurisdiction over a child custody case in one state; and, 2) protect the order of that state from modification in any other state, so long as the original state retains jurisdiction over the case.”²⁴ It was also enacted in forty-nine states, to prevent parents from child abduction across state lines. Previously, it had been a common practice for noncustodial parents to take the children and find a sympathetic court in a different state willing to reverse unfavorable custody order.

In Florida, it outlines and defines the purpose of the UCCJEA in the Florida Statutes in Chapter 61, it states:

61.502-(1) Avoid jurisdictional competition and conflict with courts of other states in matters of child custody, which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being.

(2) Promote cooperation with the courts of other states to the end that a custody decree is rendered in the state that can best decide the case in the interest of the child.

(3) Discourage the use of the interstate system for continuing controversies over child custody.

²⁴ ULC, Uniform Law Commission

- (4) Deter abductions.
- (5) Avoid relitigating the custody decisions of other states in this state.
- (6) Facilitate the enforcement of custody decrees of other states.
- (7) Promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child.
- (8) Make uniform the law with respect to the subject of this part among the states enacting it.

The UCCJEA, is useful in terms of child custody of same-sex couples, because just like heterosexual couples, they have the ability to move states with the children after dissolution of marriage and creating the same legal challenges. The UCCJEA should include language in the future that speaks to issues including same-sex couples and how custody will be handled when same-sex marriage is recognized or not recognized in the home state and that in which the parent travels to. The UCCJEA speaks to different situations to follow depending on your connection with the state those are as follows:

1. **Home State Jurisdiction:** a court has home State jurisdiction if it is located in the child's home State or if it is located in the State that was the child's home State within 6 months of the proceedings' commencement.²⁵

²⁵ Uniform Child-Custody Jurisdiction and Enforcement Act (1999)

2. **Significant Connection Jurisdiction:** When a child has no home State or when a home State declines jurisdiction, another State court may exercise jurisdiction if the child has sufficient ties to the State and substantial evidence concerning the child is available in the State.²⁶
3. **More appropriate forum Jurisdiction:** a third basis for initial jurisdiction exists when both the home State and significant connection State(s) decline jurisdiction in favor of another, more appropriate State on grounds of inconvenient forum or unjustifiable conduct.²⁷
4. **Vacuum Jurisdiction:** UCCJEA provides that if no court has home State, significant connection, or more appropriate forum jurisdiction, an alternate court may fill the vacuum and exercise jurisdiction over an initial custody proceeding. This provision would apply to situations in which children fail to remain in any State long enough to form attachment.²⁸
5. **Temporary Emergency Jurisdiction:** courts have temporary emergency jurisdiction when a child in the State has been abandoned or when emergency protection is necessary because a child—or a sibling or parent of the child—has been subjected to or is threatened with mistreatment or abuse.²⁹

²⁶ UCCJEA, section 207

²⁷ UCCJEA, section 201(a)(3)

²⁸ UCCJEA, section 201(a)(4)

²⁹ UCCJEA, section 204

HOW OTHER STATES ARE HANDLING SAME-SEX CHILD CUSTODY PROCEEDINGS

Since Florida is the most recent state to acknowledge same sex marriage, it may be helpful and significant to look at other states that have recognized same sex marriage and may have dealt with the issue of child custody. After looking at Vermont (2009), Maryland (2013), and California (2013)³⁰, these states have not made changes to their statutes. They have dealt with issues in same sex marriage and child custody proceedings on a case-by-case basis and usually have followed the heterosexual divorce procedure for a recognized marriage. This makes the thesis even more significant and will hopefully allow Florida and other states to see that changes need to be made in statutes to define what will happen when one parent is not the biological parent in a same sex marriage dissolution of marriage or relationship proceeding.

³⁰ <http://gaymarriage.procon.org>

CHILD CUSTODY OF NON-MARRIED COUPLES

Now that we have discussed how to obtain a divorce and the standard of “best interest of the child” for married couples, it is important to discuss what the procedure for a non-married couple who have a child or children who decides to separate in Florida. Over 40 percent of children born in the United States are to unmarried couples. As stated earlier, our laws cannot assume that every same-sex couple will legalize their marriage with the courts and our laws should be explicit in stating what to do in either situation, a married or non-married case. If both parents are legal parents, through biology or adoption, each parent has equal custody rights to the child. To establish his custody rights, an unmarried biological father must use the Petition to Determine Paternity, form 12.983a.³¹ The father must establish paternity to gain access to rights to the child because there is no presumption of parentage when the couple is not married, unless both are present at the birth and sign the birth certificate to acknowledge paternity. Florida Statute 742.10 “Establishment of paternity for children born out of wedlock” identifies the process. In Florida and according to the Florida Department of Revenue, there are five ways to establish paternity:

1. **Marriage:** The parents are married to each other when the child is born
2. **Acknowledgement of Paternity:** The unmarried couple signs a legal document in the hospital when the child is born, or later
3. **Administrative Order Based on Genetic Testing:** Paternity is ordered if a genetic test proves fatherhood

³¹ Unmarried Child Custody - Custody Law and Custody in Florida Explained

4. **Court Order:** A judge orders paternity in court
5. **Legitimation:** The mother and natural father get married to each other after the child is born and update the birth record through the Florida Office of Vital Statistics³²

In Florida, if the parties have not agreed to paternity, this issue must be established by court order. The parents will then determine a parenting agreement. If the parties cannot agree, either parent can petition the court for child custody/visitation rights, and the court will determine the best interest of the child. Whether the parents are married or not, the best interest of the child will always be the priority of the court in determining any case involved with child custody. That is the standard Florida courts should apply to same sex couples in custody proceedings. Ideally, a divorce or dissolution of a relationship for heterosexual and homosexual couples will be the exact same process to remain consistent and provide equal protection under the law.

³² Florida Department of Revenue, *Establishing Legal Paternity*

CHILDREN BORN WITHIN THE MARRIAGE

In Florida, when a child is born while his/her mother is married regardless of when the child was conceived, the husband is the presumed legal father and no paternity case is necessary to establish the husband's paternity. If it cannot be agreed on or proven that the parent is not biological of a child born during the marriage, there needs to be an action for termination of parental rights. This termination means that they will not be considered the legal parent of the child and will not have rights or responsibilities regarding the child. The signing of the birth certificate is an acknowledgement of paternity that creates a rebuttable presumption that the man is the father of the child.

Section 742.091, Florida Statutes, provides that, if the mother of any child born out of wedlock and the reputed father marry each other at any time, the child shall "in all respects be deemed and held to be the child of the husband and wife, as though born within wedlock." This is a very important section for Florida with the new legalization of same sex marriage. This could mean for Florida that if a same sex couple has a child currently together and gets married, the child could then be presumed to be the child of the women or men when their marriage is officially recognized. This situation also presumes that the parties were in a relationship prior to the marriage. Because the child could also be from another relationship, it would be clearer for a parent to have a step parent adoption of a child.

PROPOSED SOLUTIONS FOR FLORIDA

With Florida recognizing same sex marriages, it is now time to establish and update the laws in Florida. Even with the recent legal changes, Florida needs to clarify and establish laws for determining child custody and parental responsibility.

1. Modify and update Florida statutes according to the Florida law that includes legal marriage and adoption for homosexual couples.

Currently, the Florida statutes still explicitly define marriage between a man and a woman and state that same sex couples do not have the right to adopt³³. It is so important to remove and update that information to prevent courts from continuing to use that statute against the same-sex couple and refusing homosexual couples their constitutional rights.

2. Recommend that in Florida Statutes use parent(s) or parentage instead of the use of mother, father, maternal, or parental when determining or concerning children.

The use of general neutral language is so important to the changes in Florida law. It currently only confuses the application of the law in the courts and it is not representative of the population that should be recognized by the law. Using the gender neutral language does not make an assumption in any legal situation and could provide more room for interpretation of the law for the same sex couples facing dissolution of a relationship or marriage.

³³ When this thesis was in its final edits, CS/HB 7013 was pending. If signed into law it should align the statute with the current law and allow homosexual adoption.

3. Clearly state options for parentage for non-biological and non-married parents.

Currently, Florida law does not address parenting issues for same couples except in the statutes cited above which restrict adoption by homosexuals. It is important to clearly define the rights of a non-biological parent and consider the best interest of a child that has been raised since conception or birth. We cannot assume every couple will get married or adopt, so it is important that the law addresses parental rights of homosexual parents who have not married as they have with paternity.

4. Adopt a law that establishes that if a child is born within the marriage that child is conclusively presumed to be a child of that marriage.

Right now, Florida has that presumption of parentage when a child is born within the marriage, but the language only addresses a father's paternity, which may not always be the situation for same sex couples. Also, paternity can currently be rebutted due to lack of biology. A solution would be to no longer allow this presumption to be rebutted unless both parties agree that the child will not be considered the legal child of a parent. If there is a legal marriage, both parents should be allowed to sign the birth certificate and establish an irrefutable presumption of parentage. This will also benefit the child who will not lose a parent if the parties do not remain married.

5. No longer emphasize or establish biological parentage as a factor when it comes to parental rights.

Biology should no longer play a determining role in child custody for parents. Being the biological parent to a child, does not make that person the most fit to receive the rights to the child and does not address same sex couples. Although beyond the scope of this thesis, this could also have implications for heterosexual couples. New conception techniques and the intention of the couple at the time of conception and birth should provide direction for the determination of parentage. The fault should not be on the parent who gave up the opportunity to serve as the biological parent or who could not conceive the child.

6. The language of the statutes should clearly recognize second-parent adoption for homosexual couples that do not chose to marry.

Not every same sex couple will get married, but Florida law should clearly address child custody and parental rights to be applied in those cases. Florida statutes currently addresses child custody when children are conceived out of wedlock and the same procedure should apply with the addition of allowing second-parent adoption to equate to the biological requirement. Second-parent adoption will then allow these couples to establish or maintain parental rights when a couple separates

7. Apply the best interest of the child standard in every child custody proceeding.

The law should clearly state that in any child custody suit in Florida, the court is required to use the best interest of the child standard in determining child custody. The factors in determining child custody are essential in determining the parent's interest and involvement in the child's life and the environment of the child when with any parent. When parents dissolve their relationship,

it should never be about what the parents want, it should always be what is in the best for their child.

CONCLUSION

Florida does not address the issues facing same-sex couples when they decide to separate or dissolve their marriage. This creates inconsistencies in decision-making and denial of parentage to nonbiological parents. In Florida, January 5, 2015 will forever be a milestone in the LGBT community. Not only was marriage recognized, but also it drastically changed their ability to gain legal rights to a child conceived or adopted in their relationship. The most important aspect to understand is that Florida currently places too much emphasis on biology in the determination of child custody and should use the best interest of the child standard. It is imperative to remove the restrictions in the adoption statute and redefine the meaning of marriage for the representation of the LGBT community and future legal proceedings. Florida has already decided that it is unconstitutional to deny same-sex couples the right to marry and to adopt, and with the proposed changes to the statutes, same-sex couples will have the same right to dissolve their relationships without the fear that they will lose their children too.

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