Legal Issues Related to the LGBTQ+ Community

1. LGBTQ+ individuals hope, when consulting with an attorney, that they will be provided with a good-manners interaction and treated like an important client, that is an important person. As an aside, the same thing applies to the medical profession, but in some of those cases, the LGBTQ+ individual does not have a choice because of the way health care is controlled and access is provided, or not provided, in our society. Also, bisexual individuals comprise a very large cohort group within the LGBTQ+ community and suffer greater negative health outcomes than the other sub-groups. See: https://www.prideinpractice.org/articles/bisexuals-health-outcomes-physicians-help

2. HIV infection is a big factor, even now and even though it is not unique to any one population group, it has had a significant impact on how an attorney/provider might treat someone, even down to not shaking hands.

3. LGBTQ+ seniors come with special needs and concerns. For example, many were young before the Civil Rights movement, often worked under despicable employment conditions. See Executive Order 10450 signed by President Eisenhower. See: https://en.wikipedia.org/wiki/Executive_Order_10450

   Seniors often have a different self-identifying vocabulary and can often be more secretive about their sexual orientation; although, this can be true of younger people too. Sometimes, a confidence may be provided but only with the understanding that it is truly a secret.

4. Pre- and Post-Obergefell. LGBTQ+ individuals lived in a mixed world where "gay marriage" was completely outlawed, then lawful in some jurisdictions and now a right afforded to all same-sex couples.[1] For example, what is the impact within the history of a same-sex relationship/marriage regarding equitable distribution and what is/is not marital property. The impact in the trust and estates area is complicated, and was, for so many for so long, tragic.

5. To the eye of a heterosexual or naive practitioner during an initial consultation he/she might think, "Oh, he's gay" or "She's a lesbian" and maybe that is correct. But often, who really knows?

6. "Gay" or "non-gay" lawyers. Some LGBTQ+ attorneys are "out" and "opening gay" but this is not a signal that they focus their practice on the LGBTQ+ community exclusively, although, some do. I always advise people to seek a specialist aligned to the issues(s) at

[1] I do not use the terms "straight marriage" or "heterosexual marriage" because, and probably more than many might imagine, one or both of the parties in the marriage is not a heterosexual, albeit often closeted. I use the terms "opposite-sex marriage" or "opposites-sex couple".

hand. Just because an attorney is "gay" does not mean he/she is a good fit for a specific legal matter.

7. I have not read this American Psychological Association book, but it is on my list now:

   https://www.apa.org/pubs/books/dismantling-everyday-discrimination?utm_campaign=apa_publishing&utm_medium=display_google&utm_source=books&utm_content=apa-books_dismantling_everyday_discrimination_publishing_search_campaign_04242023&utm_term=dismantling_discrimination_adgroup&gclid=EAIaIQobChMIxaOav_7W_gIVlw6zAB1cHgsHEAAYAiAAEgItV_D_BwE

8. As Ms. Manners advised when someone wrote in asking for advice on how to great a gay couple who were expected at one of her affairs. Ms. Manners reply was, "How do you do?" "How do you do?".

9. Some misconception about the LGBTQ+ community. It is really a community of communities. Many very well-intentioned people think it is all just fine today and there is really no problem for LGBTQ+ people and that is simply not true. Try to get a durable power of attorney or advanced health care directive recognized and honored when you are in a hospital emergency room with your spouse and where the staff are "anti-gay" or maybe just not trained in cross-cultural communication.

10.

Some Dos and Don'ts

1. Be up front about what your practice is and how you might be able to help. If you are a "gay" attorney, don't agree to take someone on as a client, just because you both are "gay" when their legal issues are out of your scope of practice.
2. Be professional and help if you can.
3. Train your associates and office staff on how to provide good professional service and let them know that if dealing with "gay" clients is not their cup of tea, you will show them door. Micro-gestures can be very easily picked up and are cruel and inappropriate office demeanor. You might be nice and professional, but if your office environment is not, then you will lose the confidence and business of client.
4. Although it might be difficult to believe, an attorney, or anyone else for that matter, deals with "gay" people everyday without knowing that individual is "gay". Unlike many groups that experience prejudice and discrimination, the LGBTQ+ community is significantly underground, often for reasons of fear of being thrown out of one's family; workplace torment; religious reasons, and fear of physical danger and harm. The research shows that a great number of homeless youths in New York City are "gay" kids cast out of the family home. Let the individual share as they wish or not wish. Concentrate on the legal matter at hand.

FEATURE

Cultural Competence to Represent LGBTQ Clients Post-Obergefell

Takeia R. Johnson

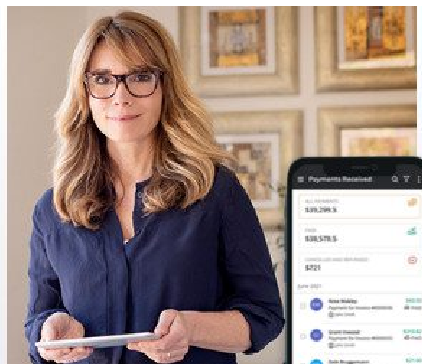
Share:

The Supreme Court decision in *Obergefell v. Hodges,* 576 U.S. __ (2015), secured marriage equality for lesbian, gay, bisexual, transgender, and queer (LGBTQ) people, yet, these same individuals may be fired from their jobs for being LGBTQ; in some states, transgender and gender-nonconforming people may be prosecuted for failing to use public restrooms and locker rooms that correspond to their assigned sex at birth. Post-*Obergefell,* these communities, as well as the broader LGB community, must refocus their political agenda to address issues such as homelessness among LGBTQ youth, poverty, workplace and housing discrimination, and violence against black trans women, along with an alarming plethora of other social, legal, and political issues. With this refocusing and, consequently, broadening of activism agendas, lawyers increasingly will represent LGBTQ clients to secure and defend rights and justice. What will lawyer-client relationships look like now that marriage equality has been won? LGBTQ clients require lawyers who are not only competent when it comes to substantive law and the workings of the legal system; these clients also require lawyers who are familiar with the demographics, intersecting identities, and sociopolitical issues and interests of LGBTQ people. Lawyers must be culturally competent.

Thryv's on the clock—even when you're not

Meet the all-in-one software app that gives you time back in your day.

SEE HOW



thryv

Must LGBTQ Lawyers Represent LGBTQ Clients?

Some people wonder whether LGBTQ clients will be best served by lawyers who also identify as LGBTQ. A similar question has been asked in the context of diversity and inclusion within the legal

profession: Do racially/ethnically diverse lawyers require racially/ethnically concordant mentors in order to best thrive within the profession generally and in particular workplaces? The answer to both questions may seem obvious: of course not. A black woman is not the only person who can mentor a black woman, a person with a disability is not the only person qualified to represent a client in an Americans with Disabilities Act case.

The most apparent reason why LGBTQ clients cannot solely be represented by identity-concordant LGBTQ attorneys is because there simply are not enough openly LGBTQ practicing lawyers. The same is true of other diverse attorneys, excluding women. Clients would be left without adequate access to attorneys to represent them. It would also be largely unfeasible, leaving clients (and diverse lawyers) underrepresented within the judicial system. Further, requiring LGBTQ identity concordance between lawyers and their clients would be counter-intuitive to inclusion efforts. It would close off clients to whole groups of passionate and competent attorneys who do not identify as lesbian, gay, bisexual, transgender, or queer.

Finally, no community or population is monolithic. Just because a lawyer is black, gay, or a woman does not mean that lawyer will hold and exhibit cultural competence in a way that is inclusive of the lived experiences and identities of other women or black or gay people. There are a variety of reasons why this may be the case. For instance, these lawyers face significant social and professional pressure to conform and assimilate. They constantly have to navigate the uneven terrain of being "black enough" but not "too black," feminine but not too feminine, gay but not too gay. Lawyers and their clients do not have to share sexuality and/or gender identity concordance for justice to be served. Lawyers, however, must be culturally competent when representing LGBTQ—and all other—clients.

Cultural Competence

Some legal scholars advocate for cultural competence training in legal education. Not surprisingly, there is no standard definition of cultural competence, nor any uniform requirements related to cultural competence, diversity, or inclusion as it relates to law schools or the legal profession. The American Bar Association does, however, require law graduates and lawyers to obtain ethics credits through continuing legal education (CLE). CLE ethics courses sometimes include information and training on issues of diversity and inclusion, but they do not follow any established curriculum related to cultural competence.

The Association of American Medical Colleges (AAMC), however, has had a set standard for cultural competence in medical education since 2000, expressed in the AAMC document *Cultural Competence Education* (tinyurl.com/pceqtnq). The medical profession has long understood that social and cultural factors impact the quality of health services and treatment that patients receive. While acknowledging that multiple definitions of cultural competence exist in this field, this AAMC document opens with the single definition that is most widely accepted within the medical and medical education professions:

> Cultural and linguistic competence is a set of congruent behaviors, knowledge, attitudes, and policies that come together in a system, organization, or among professionals that enables effective work in cross-cultural situations. "Culture" refers to integrated patterns of human behavior that include the language, thoughts, actions, customs, beliefs, and institutions of racial, ethnic, social, or religious groups. "Competence" implies having the capacity to function effectively as an individual or an organization within the context of the cultural beliefs, practices, and needs presented by patients and their communities.

The legal profession has not made a similar attempt at establishing generally accepted standards of cultural competence or even attempted to accept generally that social, cultural, and political factors influence individuals' interactions with the legal system, at all levels and locations.

Before we understand competence, we must first conceptualize "culture." While most cultural competence literature (in both medical and legal education scholarship) focuses exclusively on race and ethnicity, conceptualizations of cultural competence must also include religion, sex, gender, sexuality, class, mental and physical ability, age, marital and/or parental status, among others, and interactions thereof. We must also understand the following (adopted from Zofia Kumas-Tan, Brenda Beagan, Charlotte Loppie, Anna MacLeod, and Blye Frank, "Measures of Cultural Competence: Examining Hidden Assumptions," *Academic Medicine,* June 2007 (82:6): 548–57):

- The "Other" is not the only group that possesses culture; socially dominant or majority groups such as white people or men also possess culture. We cannot limit our understanding of culture to requiring white people to understand the Other.

- Cultural competence must include understanding and awareness of power and white privilege. Instead of solely focusing on disadvantage, we should also concern ourselves with

privilege and domination.

- Competence does not exist in a bubble. You cannot simply learn it in a training session and then deem yourself "competent." Competence also involves continued interaction with, and understanding of, the experiences of other groups.

- Cultural competence means more than understanding how individuals stereotype and hold discriminatory attitudes toward the Other. To be culturally competent, actors in the legal profession must understand and accept the larger structural and systemic barriers limiting full inclusion and access to justice that many people face.

Competence also requires "cultural humility," a lifelong commitment to "a process that requires humility as individuals continue to engage in self-reflection and self-critique as lifelong learners and reflective practitioners" (Melanie Tervalon and Jann Murray-García, "Cultural Humility Versus Cultural Competence: A Critical Distinction in Defining Physician Training Outcomes in Multicultural Education" *Journal of Health Care for the Poor and Underserved,* May 1998 (9:2): 117–125). Cultural humility as a practice works to actively avoid the pitfalls of practitioners who may assume that, because they completed a discrete set of trainings on cultural competence, they have now absorbed all knowledge about all culture and can therefore apply such knowledge across the board to every and any patient/client. Cultural humility helps prevent the stereotyping that inevitably occurs when we apply generalized notions to specific people.

Cultural Competence Post-Obergefell

LGBTQ people now can marry in the United States, but they still can be fired from their jobs for being lesbian, gay, bisexual, or queer. Lawyers must develop cultural competence surrounding the unique and nuanced legal, social, and political issues of their client population, especially if they represent LGBTQ clients and LGBTQ clients who are also people of color. Clients' legal claims are inextricably linked to their social and structural settings. Their experiences with constructing and embodying race, gender, sexuality, and class directly shape their interactions in the social world. Lawyers must be open to learning and affirming these experiences. Even more crucial, lawyers must factor clients' social, interactional, and embodied experiences into how they represent clients.

There is a fallacy of objectivity within the legal profession. Studies show that unconscious biases affect lawyers' ability to "objectively" evaluate evidence and performance. Additionally, law

students are taught to "think like a lawyer," a presumption that includes "setting aside existing biases or prejudices and thinking rationally, logically, and analytically" (Andrea A. Curcio, "Addressing Barriers to Cultural Sensibility Learning: Lessons from Social Cognition Theory," *Nevada Law Journal,* Spring 2015 (15:2), 537–565). We see this, for example, in how courts determine whether a person's actions and expectations were reasonable. This fallacy of objectivity affects every aspect and each actor within the legal profession, including, most notably, the arbiters and advocates of justice: lawyers, judges, and juries.

Imagine that a lawyer previously worked as a prosecutor and that the job meant the lawyer worked closely with police officers who consistently arrested black transgender women for alleged unlawful sex work. The lawyer is a white gay male who left the county prosecutor's office to start his own civil law practice with a stated mission of helping LGBT people be treated equitably in American society. The lawyer's client is a black transgender woman alleging that her openly gay, white, male boss sexually harassed her on the job. Now imagine that the lawyer unconsciously conforms to American society's perception of black women as sexually deviant, hypersexual, and overly aggressive. (For more on these stereotypes, see Patricia Hill Collins, *Black Feminist Thought,* Routledge, 2002.) The lawyer must first believe it is possible that he, as a lawyer working under the "objectivity" of the law, is even capable of holding and acting on such beliefs. The lawyer must then become aware that he, in fact, holds these biases against black women and femmes, perhaps by periodically taking implicit association tests and by being familiar with the cultural characteristics of the populations he serves and the systemic inequalities that his clients experience. The lawyer then has to work actively to dispel his personally held beliefs.

Lawyers should also consider the social and political structures and systems of oppression that intersect to shape the lived experiences of LGBTQ people and LGBTQ people of color. For instance, lawyers practicing in certain states might find that some of their LGBTQ clients are forced to use the public restrooms and locker rooms corresponding with their assigned sex at birth. This is a dehumanizing and offensive experience by itself. Some clients might also be black people, queer or not. Cultural competence means that lawyers understand that black masculinity is stereotyped as violent and aggressive while black women are stereotyped as both hypersexual and aggressive. (For more, see David S. Pedulla, "The Positive Consequences of Negative Stereotypes: Race, Sexual Orientation, and the Job Application Process," *Social Psychology Quarterly,* March 2014 (77:1): 75–94.) Lawyers representing black transgender folks should understand these intersections and others, and how they impact clients' social position and experiences.

Cisgender, queer, and transgender communities usually have diverging activist priorities, and, historically, the broader cisgender queer social and political priorities are privileged over the needs of trans communities. (This article uses "queer" as an umbrella term for gay, lesbian, bisexual, pansexual, same-gender loving, asexual, and poly sexualities.) According to "Injustice at Every Turn: A Report of the National Transgender Discrimination Survey" by the National Center for Transgender Equality and the National Gay and Lesbian Task Force, while marriage equality was important to transgender and gender nonconforming individuals, it was not the most important issue. Issues such as access to competent health care and housing and employment discrimination posed more imminent threats to their well-being. Lawyers with transgender and gender-nonconforming clients should know what is important to their clients and the communities they serve.

Being undocumented and trans presents additional challenges that lawyers should know about. The ubiquitous fears of removal proceedings owing to one's undocumented status and the consequences should be within a lawyer's body of knowledge when representing queer and trans undocumented people. Lawyers representing these groups should also be cognizant that undocumented people may find it difficult to trust Americans, particular those in positions of power, even if that person is their lawyer. These clients may not want to be completely forthcoming because they fear removal to their home countries as well as suffering physical and mental harm based on their queer and/or trans identities while imprisoned in detention facilities.

Consider, also, what visibility means for the client population that attorneys serve. What does it mean for lawyers to position themselves as spokespersons to the media for a claim of civil rights, housing or employment discrimination, and the like? What is it about the lead plaintiff in a class action lawsuit that makes them desirable as the public image of the case? These are just a few cultural competence considerations for lawyers and their clients.

Conclusion

With the historic *Obergefell* ruling comes new and advanced challenges to full inclusion of LGBTQ communities into American society. New legal battles will be waged, political campaigns will be organized, and social protests will be conducted. Lawyers will be called to advocate on behalf of these communities. We must be prepared to do so.

This preparation must first involve the legal profession as a whole committing to training its attorneys to be culturally competent in order to best represent their clients. The American Bar Association must take seriously the need to promote and train lawyers in cultural competence. As in the medical profession, law school accreditation and education should require cultural competence curriculum. It should work toward developing cultural competence standards by which lawyers and law students may be measured.

As representatives of justice, lawyers must be the foremost ambassadors of cultural competence. When taking on a new matter or working with a new client, ask yourself why you are working with this client. Determine whether you understand your clients and their legal issues, both as a lawyer competent in the law and the legal system and as a culturally competent lawyer. While lawyers should pursue training, they should also remember that there is no single class or set of classes that, when taken, will make lawyers culturally competent in perpetuity. Remember that cultural competence is an ongoing process. It is also multi-dimensional and multi-level. Cultural competence involves knowledge of yourself, the privilege you possess, and the unconscious biases you hold. It also involves knowledge of your client (individual or organizational) and the structural issues that impact how your client navigates the social world. Finally, cultural competence demands humility and commitment.

Anxiety and fear are some of the most pervasive barriers to diversity, inclusion, equality, and equity. Anxiety and fear prevent allies from speaking against injustice and unfairness. Fear of losing social standing not only blocks anti-inequality efforts, but it also encourages active reinforcement of privilege and systems of oppression. As lawyers, we cannot shrink from our duty to promote and advance justice. Yet, we do just that if we do not take seriously the pursuit of cultural competence.

Authors

Takeia R. Johnson

Takeia R. Johnson, Esq., is an attorney and Ph.D. student in sociology at the University of Illinois at Chicago. She is also the founder, editor, and chief writer of the Institute for Inclusion in the Legal Profession's blog, Inclusion at Work.

The New York State Unified Court System

USING LGBTQ+ INCLUSIVE LANGUAGE AND PRONOUNS

UCS Benchcard and Best Practices for Judges

Judges have an obligation to foster a judicial environment free of bias, prejudice, and harassment.[1] It is "misconduct" to discriminate based on sexual orientation, gender identity, or gender expression.[2] Where a party or attorney has advised the court that their preferred *[chosen]* gender pronoun is "they," a judge may not require them to instead use "he" or "she."[3]

WHAT DOES "LGBTQ+" MEAN?

The term "LGBTQ+" refers to lesbian, gay, bisexual, transgender, and queer or questioning people. LGBTQ+ is a widely used and reasonably inclusive term, including those of non-heterosexual sexual orientations and transgender people. Other shorthand terms used with some frequency include the letters "I" for "intersex," "A" for "asexual" or "ally," "2S" for "two-spirit" (in Native American culture) and possibly others.

GENDER VARIANT/NEUTRAL PRONOUNS

Some persons may have a pronoun choice other than he/him/his/himself, she/her/hers/herself, or they/them/their/themself. The pronoun list that follows is not an exhaustive list:

- **sie** (or ze, or zie)/hir/hirs/hirself
- **e**/em/es/eself
- **hi**/hem/hes/himself
- **na**/nan/nas/naself
- **per**/per/pers/perself
- **ze**/zim/zee's/zeeself

"TRANSGENDER" AND PRONOUN USE

"Transgender" is a broad term that includes people who do not identify with their assigned birth sex and may not conform to traditional gender expression. The term "trans*"—with or without the asterisk—is commonly used shorthand. There are others who may choose another term such as non-binary, genderqueer, or queer. Judges and court personnel should keep in mind that being transgender, regardless of a person's gender expression, is entirely unrelated to sexual orientation, Transgender individuals, like others, may be attracted to partners of any gender.

A key point: there is no precise measure of when the process of changing one's gender or sex is complete. Surgery of any kind is not a prerequisite to being transgender, but for some it is a necessity. A transgender person may have some surgery, many surgeries, or no surgeries.

The process of confirming gender is sometimes referred to as transition, of which **Gender Confirmation Surgery ("GCS")** may be just a part. GCS, sometimes referred to as bottom surgery, was once called "sex change surgery" a term now disfavored. Transition often includes social and legal components as well.

If unsure of which pronoun to use to refer to a person, **ask the person** – it is not considered rude, indeed, asking is seen by most as a sign of respect. When referring to past events of a transgender person, maintain the individual's chosen pronouns presently in use for the historical narrative. For example, "Defendant lived with her wife until separation."

1 22 NYCRR 100.3(B)(3-5)
2 NY RULES OF PROF'L CONDUCT r. 8.4(g) (NYS BAR ASS'N 2021).
3 NY Advisory Committee on Judicial Ethics, Op. 21-09 (2021).

10/2022

OFFICE *for* JUSTICE INITIATIVES
ACCESS TO JUSTICE

The New York State Unified Court System

USING LGBTQ+ INCLUSIVE LANGUAGE AND PRONOUNS

UCS Benchcard and Best Practices for Judges

INCLUSIVE LANGUAGE IN COURT

Inclusive language in the courtroom conveys the message that all people, regardless of orientation, gender identity or gender expression, will be treated with dignity and respect. Gender-inclusive language helps in avoiding misgendering people in the courtroom. When judges and lawyers share/volunteer their own pronouns, it reduces the perception that pronouns are only relevant for gender-diverse persons. If a judge becomes aware that a party is or may be transgender, the judge should consider asking questions such as:

- **What name do you usually go by?**
- **Is your birth/legal name different?**
- **Which name do you want me to use with you?**
- **How would you like to be addressed? For example, I use [the judge's pronouns].**

This shows compliance with the recent changes to the ethical and professional rules that govern the conduct of attorneys and judges.[4] Further,

- **Judges and attorneys can volunteer their chosen pronoun during appearances and jury introductions.**
- **Judge's pronouns can be included on courthouse/ room signage.**
- **Use the name of the person or gender-neutral words such as, "folks," "guests," "jurors" and "counsel."**
- **Avoid terms and phrases that are gender-specific such as "ladies and gentlemen of the jury," "sir" and "ma'am."**
- **Realize a person's chosen pronouns may change, and that some people may have pronouns that are fluid or interchangeable (such as "she/they").**
- **Honorifics: in addition to Mr./ Ms./ Miss/ Mrs., there are gender-neutral choices, such as M. or Mx.**

4 Hyer, Wallach and Browde *Examining Judicial Civility in New York Courts for Transgender Persons in the Wake of United States v. Varner* (NYSBA Latest News 8.18.2020)

IMPORTANT TERMS TO KNOW

AFAB/AMAB: Assigned female at birth/ Assigned male at birth. Acronyms indicating that the individual's assigned sex at birth was in error.

Gender Confirmation Surgery ("GCS"): sometimes referred to as "bottom surgery," was once called "sex change surgery" a term now disfavored.

Gender expression: the way a person demonstrates their gender through outward manifestations such as clothing, mannerisms, style, etc.; this may not match gender identity.

Gender identity: an individual's perception of their own gender.

Gender non-binary: Identifying as neither male nor female.

Gender nonconforming: Not identifying with a recognized gender.

Intersex: A term used to describe natural differences in sexual development/traits that affect approximately 1.7% of the population.

MBT/WBT: man born trans/ woman born trans

DISFAVORED TERMS

FTM (female to male) and MTF (male to female): acronyms indicating that a person has transitioned from one sex to the other.

Transsexual: A person that has transitioned medically from one sex or gender to another (disfavored due to the "change" implication).

TERMS TO AVOID

hermaphrodite, she-male, he-she, tranny, transvestite.

Within the LGBTQ+ community there has been a reclamation of some words historically used pejoratively against LGBTQ+ persons. Ex. Some folks use "queer" and "dyke" as positive, respectful terms. Although LGBTQ+ people may use these terms, they are often seen as derogatory when used by others. **Exercise extreme caution with respect to such words.**

LGBTQ Family Law and Policy in the United States FREE

Erin Mayo-Adam, Department of Political Science, Hunter College

https://doi.org/10.1093/acrefore/9780190228637.013.1216
Published online: 30 January 2020

Summary

There is a growing body of research on law and policy concerning lesbian, gay, bisexual, transgender, and queer (LGBTQ) family law and policy. LGBTQ families have existed for centuries despite laws and policies that criminalize their relational practices. However, the legal landscape has shifted a great deal over the past few decades, in large part due to the increased visibility of LGBTQ kinship networks and new constitutional protections for same-sex marriage. With this said, legal protections for LGBTQ families vary widely by state, especially parental, adoption, and foster care rights. Historically, family law and policy has fallen within the realm of state power, with some important exceptions (e.g., the Supreme Court has recognized a fundamental right to parent for legal parents). For this reason, there are broad protections afforded to LGBTQ kinship networks in some states, especially those with large urban and more liberal populations, and barriers that stand in the way of LGBTQ parental rights in other states that are more conservative or rural. The legalization of marriage equality in *Obergefell v. Hodges* did standardize some protections for same-sex couples in traditional relationships across the United States. Yet the case also presents new problems both for LGBTQ families that are more heteronormative and those that are not because it fails to recognize a fundamental right to parent for LGBTQ people who create non-biological families and live non-traditional lives.

In addition to these legal and policy changes, social scientists have used both qualitative and quantitative methodologies to shed light on the problems faced by LGBTQ families politically and legally. Researchers have examined how LGBTQ families attempt to protect their ability to parent in family court, how LGBTQ kinship networks identify innovative legal and political strategies aimed at overcoming barriers to legal recognition, and how LGBTQ identity is both constituted and made invisible through family law. Furthermore, scholars have produced a wealth of research refuting the myth that LGBTQ people are inadequate parents since the late 1980s and this research has been used in court cases across the United States to facilitate the legal recognition of LGBTQ families. Despite this research, gaps in both scholarship and legal recognition remain. Scholarship remains startlingly sparse given the legal and political barriers that stand in the way of LGBTQ family recognition, especially for LGBTQ people of color and trans and queer people. In order to address this gap, scholars should devote more resources to research on families that include LGBTQ people of color and trans and queer people, research on non-traditional queer kinship networks, and research on the unique ways that LGBTQ families are responding to political and legal barriers at the local level.

Keywords: sexuality, gender, family law and policy, LGBTQ, LGBT politics, law and social movements

Subjects: Groups and Identities, Politics, Law, Judiciary

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

Limits and Advances in LGBTQ Family Recognition and Acceptance

The legal landscape for lesbian, gay, bisexual, transgender, and queer (LGBTQ) families varies tremendously across the United States because, with few exceptions, the authority to decide what constitutes a family lies predominantly within the realm of state and local law. Despite this variation, there has been some important action at the federal level that applies nationally. Most notably, federal case law has forced recalcitrant states to recognize some LGBTQ families, such as the 2015 Supreme Court decision *Obergefell v. Hodges*, which legalized same-sex marriage nationally. However, significant obstacles remain for the full legal recognition and acceptance of LGBTQ families. I analyze LGBTQ family law and policy in the United States in four parts. First, I provide an overview of the evolution of LGBTQ family law and policy in the United States with a focus on parental rights. LGBTQ family law has changed rapidly as a result of growing social and political acceptance for many LGBTQ families, especially those whose lives most closely resemble those of white, upper-class, and nuclear heterosexual families. Although some of the most egregious cases of discrimination are in the past, LGBTQ families still face difficulties obtaining legal parentage, serving as foster and adoptive parents, and attaining custody of their children in court. Second, I unpack how the legalization of marriage equality in *Obergefell v. Hodges* has impacted LGBTQ family law. *Obergefell* is undoubtedly a major victory for same-sex couples. Yet the case also presents new problems for both LGBTQ families that are more heteronormative and those that are not. What legal obstacles remain for queer kinship networks after *Obergefell*?

After analyzing LGBTQ family law and policy post-*Obergefell*, I then examine social science research on LGBTQ families and queer kinship networks. In particular, I highlight studies that are relevant to the politics of LGBTQ parenting, family, and kinship networks in the United States. Although social science research on LGBTQ families is limited, there are many groundbreaking studies that center the lived experiences of these families in U.S. political life. Finally, I conclude with a brief discussion of the future of LGBTQ family law and policy research. Because most social science studies focus on national politics, policies, and law, there many gaps in the research. Furthermore, most research tends to focus on white, middle- and upper-class lesbian and gay couples alone. Although research on LGBTQ kinship networks has grown in recent years along with increased visibility, more research is needed in order to address the obstacles that LGBTQ families and queer kinship networks continue to experience legally and politically. For instance, it is common to come across research on LGBTQ family law that does not include the experiences of trans and queer people and LGBTQ people of color or interrogate the barriers they face in different local contexts, especially in more conservative and rural areas of the United States. Hence, I conclude with a call to expand social science research on this subject and to create studies that are more inclusive of the broad spectrum of people who are part of the LGBTQ community.

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

The Evolution of LGBTQ Family Law and Policy

Because family law and policy are predominantly controlled by individual states, it is not possible to relay all of the different permutations of LGBTQ family law in this short article. However, there are some general principles that apply in most state settings. How these principles are interpreted and applied varies depending on local context. Concepts that apply across states include legal parentage (i.e., the person or persons whom the law recognizes as a parent for child welfare and custody purposes) and the "best interests of the child" standard (Brower, 2017; Richman, 2009; Shapiro, 2013). Legal parentage is constitutionally protected (see *Troxel v. Granville* 530 U.S. 57 (2000)) and generally determined through either adoption or conception and birth. The "best interests of the child" standard is the primary legal doctrine used in child welfare and custody determinations in court. The standard gives judges the discretion to determine custody arrangements based on the individual circumstances of each child welfare and custody case.

LGBTQ families have long faced discrimination when seeking legal parentage. Discrimination can occur through any of the pathways that lead to legal parentage. Same-sex couples have faced legislative bans on lesbian and gay foster and adoptive parenting (George, 2017). For example, until 2010, Florida explicitly prohibited same-sex couples from adopting.[1] In the past, when homosexuality and non-normative gender identities were wrongly considered perversions that justified criminalization, bans on LGBTQ adoptive and foster parenting were more common. During the mid-1970s, same-sex parents were often deemed inherently unfit to parent in child welfare proceedings for this reason (George, 2017). In many rural and more conservative areas of the United States, problematic stereotypes and beliefs about LGBTQ people continue to threaten the ability of LGBTQ people to engage in foster and adoptive parenting. Furthermore, the rise of state-based religious freedom bills also threatens LGBTQ adoptive parenting. These bills enable adoption agencies to refuse to place children with LGBTQ people if doing so violates the agency owners' sincerely held religious beliefs. For this reason, these bills continue to enable the stigmatization of LGBTQ families and serve as a significant barrier to the right to parent for LGBTQ people. Laws that ban or enable providers to prohibit same-sex foster and adoptive parenting for religious reasons significantly harm same-sex couples and LGBTQ people, who are far more likely than different-sex couples to raise adopted children. In 2016, 21.4% of same-sex couples were raising adopted children compared with only 3% of different-sex couples (Dowd, 2018; Goldberg & Conron, 2018).

In addition to discrimination in foster and adoptive parenting (one of the pathways to legal parentage), LGBTQ families can also face barriers to legal parentage when children are conceived naturally or through assisted reproductive technologies. Many of the early child custody cases in the United States involved children of divorced different-sex parents where one parent was lesbian, gay, or trans (Acocella, 2016). In these cases, lesbian, gay, and trans parents were often denied custody of their biological children because of prejudiced beliefs that their sexual orientation would harm their children. For example, in 1977 a New Jersey court limited Sandra Panzino's legal parentage by denying her custody of her two biological daughters because the court believed her children might suffer social stigmatization as a result of her sexual orientation. The court granted custody to her heterosexual ex-husband (Rivers, 2013, p. 59). Although

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

denying custody of biological children to LGBTQ parents is more rare today, family courts still allow problematic stereotypes to shape child custody decisions, especially in more rural and conservative areas of the country.

Same-sex couples are also far more likely than different-sex couples to raise nonbiological children and children produced through surrogacy and assisted reproductive technology (NeJaime, 2015). Nonbiological parents face additional complications when trying to attain legal parentage due to onerous second-parent adoption and stepparent adoption procedures, which are expensive and involve invasive home visits from social workers (Boggis, 2001). Nonbiological parents continue to face barriers to legal parentage in most jurisdictions, especially those that emphasize biological parentage in legal parent determinations (Dalton, 2001). Furthermore, most jurisdictions still ban or place limits on surrogacy contracts. This restricts the opportunities available for gay couples and LGBTQ families that cannot reproduce through other assisted reproductive technologies to become legal parents. For example, a number of states implemented surrogate parenting bans in the 1980s (including New York and New Jersey) due to the infamous "Baby M" case.[2] The case involved a court battle over the custody of a child produced through surrogacy and sparked public outrage that encouraged state legislatures to pass laws restricting surrogate parenting contracts (Hartocollis, 2014).

Furthermore, LGBTQ families have historically faced discrimination in child welfare and custody decisions as a result of the "best interests of the child" standard. According to Richman (2009), the great flexibility and indeterminacy that comes with the "best interests of the child" standard has served as a double-edged sword for LGBTQ families. When a judge is accepting of LGBTQ families, the judge has the discretion to make child custody arrangements that recognize and affirm raising a child in an LGBTQ family environment. However, this same discretion also leaves room for discrimination and bias. For instance, in 1995, Sharon Bottoms was famously denied custody of her five-year-old son when a judge, in applying the "best interests of the child" standard, determined that she was an unfit parent because she "openly admitted . . . that she is living in an active homosexual relationship" (Ball, 2012, pp. 1–2; Bottoms v. Bottoms 457 S.E.2d. 102 (Virginia, 1995)). Similarly, in the case *Daly v. Daly*, Suzanne Lindley Daly, a parent who transitioned while her child was a minor, was denied custody and visitation rights under the "best interests of the child" standard in 1986. In the case, the court ruled that Daly's gender identity posed a "serious risk of maladjustment, mental, and emotional injury" to her child (*Daly v. Daly* 715 P.2d 56, 59 (Nevada, 1986)). Denying custody and visitation because of a parent's LGBTQ status under the "best interests of the child" standard has become more uncommon for biological parents over time, with many courts overturning precedents such as those set in the *Bottoms* and *Daly* cases (at least in urban and liberal areas of the country). However, the discretion granted to judges under the "best interests of the child" standard continues to enable judges to consider LGBTQ status when making custody and visitation decisions. Nonbiological parentage for LGBTQ people is especially precarious because, in addition to prejudices surrounding LGBTQ status, judges can falsely presume that biological parentage better suits the "best interests of the child" than nonbiological parentage.

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

Finally, the likelihood of custody restrictions and legal parentage denials increases for more marginalized people within the LGBTQ community, including trans and gender-nonconforming parents, bisexual parents, LGBTQ parents of color, and low-income LGBTQ parents. Trans and gender-nonconforming parents face greater risk of losing custody of their children under the "best interests" standard because there are no explicit laws that state that a parent's gender identity should not be considered as a factor in child custody proceedings that employ this standard (Downing, 2013). In addition, bisexual parents are more likely to face challenges to their fitness as parents under the "best interests" standard because of stereotypes and prejudices connecting bisexuality to instability and promiscuity (Marcus, 2015; Ross & Dobson, 2013). Low-income parents and parents of color, including those who are LGBTQ, are more likely to have their custody and parental rights limited because police and social service interventions in child welfare emergencies are more common in their communities (Clifford & Silver-Greenberg, 2017; Wacquant, 2009). According to Dorothy Roberts (2012), the child welfare system is designed to regulate and punish black mothers, whose children are disproportionately overrepresented in the system. This is driven by a punitive approach to foster care that is based in racial stereotypes that negatively characterize black mothers' parental fitness (Roberts, 2012, pp. 1485–1486).

LGBTQ Family Rights and Politics After *Obergefell v. Hodges*

Despite the evolving legal restrictions on LGBTQ parenting, legal recognition and acceptance of LGBTQ families has increased dramatically. In the past, same-sex couples were denied access to family recognition through marriage in the United States. As a result, same-sex couples fought for the rights and benefits associated with marriage in a piecemeal fashion. Over time, domestic partnerships and civil unions emerged as vehicles for granting various rights and benefits associated with marriage to same-sex couples. Initially, same-sex couples fought to be recognized through domestic partnerships. However, the rights and benefits associated with domestic partnerships varied a great deal by state, with some states merely recognizing some inheritance rights and other states eventually passing expansive domestic partnership laws that enabled domestically partnered same-sex couples to access all of the rights and benefits of married different-sex couples at the local level. Civil unions materialized in 2000 with the case *Baker v. Vermont*, which found that prohibiting marriage for same-sex couples denied them rights they were entitled to under the Vermont Constitution. The Vermont legislature was, thus, ordered to grant same-sex couples access to marriage or create an alternative legal mechanism through which same-sex couples could access the rights and benefits associated with marriage. Civil unions emerged as this alternative mechanism.

With domestic partnerships and civil unions, same-sex couples could access state rights and benefits associated with marriage in some states. Yet they were denied access to federal rights and benefits associated with marriage under the federal Defense of Marriage Act (DOMA), passed in 1996, which limited marriage to different-sex couples for federal purposes. This changed in 2013, when the Supreme Court decided *United States v. Windsor*, which held that the DOMA violated the 5th Amendment's "equal liberty of persons" guarantee (*United States v. Windsor* 570 U.S. 744 (2013)). The majority's constitutional arguments in *Windsor* ultimately paved the way for the nationalization of same-sex marriage in the United States.

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

Perhaps the most consequential legal case in LGBTQ family law, *Obergefell v. Hodges* recognized the legitimacy of same-sex relationships that most mirrored traditional different-sex relationships by granting them access to marriage. The case also largely eclipsed and replaced the domestic partnerships and civil unions of the past. By the time the case was decided, many states that legalized same-sex marriage had eliminated these alternative legal mechanisms as options. For example, when Washington State legalized same-sex marriage in 2012, all domestic partnerships (aside from those where one member was over age 62) were dissolved within 2 years and automatically became marriages (Wyman, 2014). The plaintiffs in *Obergefell* are all same-sex couples who have traditional, nuclear families that, according to the Court, shared no differences from heterosexual families aside from the married couples' sexual orientations. Indeed, the Court explicitly acknowledged that there "is no difference between same-sex and opposite sex couples" with respect to the principle that marriage is a "keystone of our legal and social order" (*Obergefell v. Hodges* 576 U.S. ______ (2015), slip op. at 16–17). The case sought to rectify the pain and trauma associated with state bans on same-sex marriage that denied any similarities and were based in parochial views about the harms of same-sex marriage. This pain is reflected in the heart-wrenching stories of some of the plaintiffs, such as lead plaintiff James Obergefell. Obergefell married his partner, John Arthur, three months before Arthur died. Prior to Arthur's death, Obergefell cared for Arthur, who was diagnosed with amyotrophic lateral sclerosis (ALS). Ohio refused to list Obergefell as Arthur's spouse on his death certificate, citing the state's ban on same-sex marriage.

In addition to rectifying moral wrongs such as the denial of Obergefell and Arthur's marriage, the case also had a dramatic impact on parental rights and custody determinations. The Court found that same-sex marriage bans "harm and humiliate the children of same-sex couples" who "suffer significant material costs of being raised by unmarried parents" (*Obergefell v. Hodges* 576 U.S. ______ (2015), slip op. at 14). Thus, the Court concluded that same-sex marriage "affords the permanency and stability important to children's best interests" (*Obergefell v. Hodges* 576 U.S. ______ (2015), slip op. at 14). The Court's focus on the "humiliation" of children of non-married same-sex couples is problematic because it stigmatizes nonmarital queer relationships and the children who are a part of them. Nevertheless, the use of "best interests" language is important here for LGBTQ family law because it is a clear reference to the "best interests of the child" standard. This language enables married same-sex couples to challenge court decisions that deny parentage or custody based purely on lesbian or gay status. When a court denies custody solely because of a parent's sexual orientation, that custody denial can be overturned on appeal using the logic of *Obergefell*.

Although *Obergefell* marked a significant shift in LGBTQ family law by legally recognizing same-sex marriage and holding that it benefits children, the case also presents several complications for both more traditional same-sex couples and LGBTQ people in non-traditional kinship networks. *Obergefell* does not on its own guarantee LGBTQ parents legal protection over their children. This is especially true for nonbiological parents. One of the biggest unanswered questions after *Obergefell* is whether the marriage presumption applies in both same-sex and different-sex marriages. Under the marital presumption, a non-birth parent is a presumed legal parent of children born to their married spouse. The presumption has served to reaffirm the legal

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

parentage of the non-birth spouse of children born into a marriage, preventing inquiries into biological parentage (Carbone & Cahn, 2016). Under this presumption, courts assumed that husbands in heterosexual marriages were also the biological fathers of their spouses' children.

The presumption evolved over time with advances in DNA testing and is applied in different ways by states across America. Some states, such as Iowa, Texas, and Missouri, allow biological facts to easily rebut the presumption. In these states, if another person can produce a DNA test showing biological parentage, the child is no longer considered a child of the marriage. Courts that apply the presumption in this manner restrict the legal parentage status and custodial rights of nonbiological parents for children of the marriage (Carbone & Cahn, 2016, pp. 664–665). The marital presumption, when applied in this manner, is one example of how biological parentage is privileged in family law in the United States (Huntington, 2015; Klezer, 2015).

In other states, courts emphasize the importance of marriage and the non-birth spouse's prior relationship with the child. Courts that apply the marital presumption in this manner consider what is necessary to preserve the importance of the marriage and the non-birth spouse's investment in a relationship with a child when making legal parentage and child custody determinations (Carbone & Cahn, 2016, p. 666). A final set of states, including California and Massachusetts, apply the marital presumption in order to protect functional relationships. These states make legal parentage and child custody determinations based on a parent's functional relationship with a child irrespective of biological facts or whether the parent is married to a biological parent (Carbone & Cahn, 2016, p. 666).

The marital presumption presents problems for spouses who are not biologically related to their children in same-sex couples, both in states that apply the standard based on biological facts and in states that emphasize the importance of marriage. In states that make parental rights decisions based on biological facts alone, nonbiological parents in same-sex marriages can be denied parental rights unless they have also adopted children of the marriage. In addition to states that emphasize biological facts, states that focus on the importance of marriage can also decide cases in ways that harm same-sex couples even when these states recognize the legal parentage of a nonbiological spouse. In 2014, after New York legalized same-sex marriage, a judge in Brooklyn refused to grant a second-parent adoption to a nonbiological parent in a same-sex marriage. Because many states and other countries still make parental rights determinations based on biological facts, family law attorneys advise nonbiological parents in same-sex couples to adopt children of the marriage, even if a state allows both same-sex parents to be listed on a child's birth certificate.[3] The New York judge held that, because the state's same-sex marriage law required all married couples to be treated equally, the state's marital presumption applied and the nonbiological parent was a legal parent. Hence, a second-parent adoption was both unnecessary and a discriminatory application of the law since married heterosexual parents were not, likewise, required to obtain one in order to be recognized as legal parents (McKinley, 2014). Although another case has since guaranteed the right to engage in second-parent adoptions for same-sex couples in New York (Riley, 2016), the initial case created an unfortunate possibility: nonbiological same-sex married parents could be denied second-parent adoptions under the marriage presumption and then later face challenges to their parentage in other states where the marriage presumption relies on biological facts alone.

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

Decisions such as this present problems for married same-sex couples who still need second-parent adoptions for their parental rights to be recognized in all 50 states. The case illuminates how questions about parental rights remain after *Obergefell* and how the patchwork of laws that dictate what constitutes a family in the United States complicate matters further (Harris, 2017). Even when states allow LGBTQ parents to go through secondparent or step-parent adoption, the ease of attaining a second-parent adoption varies a great deal by state. Most states require judicial orders and invasive home visits that couples often have to pay for themselves. This effectively makes second-parent adoptions impossible to obtain for low-income LGBTQ parents who cannot afford them. Anti-LGBTQ organizations and politicians are also striving to prevent LGBTQ adoption at the state and federal level by advancing expansive religious freedom bills that allow adoption agencies to refuse to place children with LGBTQ families for religious or moral reasons. In 2018, Republicans in the U.S. Congress advanced legislation that bans the federal government from withholding support for adoption and foster care services that refuse to place children with LGBTQ people because of their religious or moral beliefs (Human Rights Watch, 2018; Lewis, 2018). Limits around adoption rights and other legal protections for nonbiological parents demonstrate how *Obergefell* fails fundamentally to create a broader, more egalitarian notion of what constitutes a family in ways envisioned in LGBTQ legal scholarship and family practice (Eskridge, 2012).

The failure to recognize the marital presumption also creates problems for LGBTQ couples at the federal level, especially when it comes to U.S. immigration law and policy. For example, when a child is born overseas, if the child's parents are married, the child is presumed to be a child of the marriage and has access to birthright citizenship as long as at least one of the child's parents is also a U.S. citizen. In 2019, the Trump administration issued a new policy that denied the marital presumption to married, U.S. citizen couples with children born overseas through gestational surrogacy or other assisted reproductive technologies (ART). The policy was part of a broader effort to limit access to birthright citizenship protections provided by the U.S. Constitution's 14th Amendment. However, the forms the federal government used as a part of the process did not require parents to disclose that their children were born through gestational surrogacy or ART. Married, heterosexual couples continued to reap the benefits of the marital presumption, even if their children were born through gestational surrogacy or ART, because the U.S. State Department presumed a biological relationship. By contrast, the State Department stopped presuming that married, same-sex parents were biologically related to their children. Instead, the State Department began claiming that children of married same-sex couples were born "out of wedlock" (Bixby, 2019). Children born "out of wedlock" must complete an arduous legal process in order to access birthright citizenship that requires parents to submit DNA tests to prove biological parentage, to testify that they can financially support their children, and to prove that they have lived in the United States at least five years prior to a child's birth (Bixby, 2019; Hansler, 2019; U.S. Citizenship and Immigration Services, 2019). Under the State Department's policy, children of married, heterosexual, U.S. citizen parents were automatically granted birthright citizenship—even if a child is not biologically related to one or both parents—because biological parentage is assumed for them under the marital presumption. On the other hand, because the marital presumption no longer applied to children of married same-sex couples, they could be denied birthright citizenship if the parent they are biologically related to is a noncitizen

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

or otherwise fails to meet the "out of wedlock" requirements. The State Department's policy is yet another example of how limiting the marital presumption to biological facts alone has a negative and discriminatory effect on same-sex couples.

In addition to complications stemming from the marital presumption and adoption rights after *Obergefell*, the case presents other problems for LGBTQ families as well. The case is silent when it comes to bans or restrictions on surrogate parenting contracts. Hence, limits on LGBTQ families' ability to use surrogates to produce children persist. The case also does not explicitly recognize that the right to procreate extends to LGBTQ people, which provides an opening for health insurance companies to discriminate against same-sex couples and LGBTQ families when covering infertility and assisted reproductive technologies (Murphy, 2001). In line with advances in assisted reproductive technology, many health insurance companies cover infertility treatments. However, many health insurance policies explicitly discriminate against same-sex couples and prospective single parents. For example, Sarah and Jill Soller-Mihlek were forced to pay over $13,500 out of pocket for infertility treatments because of discriminatory provisions in their health insurance policy in 2015. Under the policy, heterosexual couples receive coverage for infertility treatments after 12 months of unprotected heterosexual intercourse (the definition of infertility under the policy). Jill and Sarah were denied coverage because they had not engaged in 12 months of heterosexual intercourse before seeking treatment. The underlying assumption is based in old homophobic logic that lesbians can always get pregnant by engaging in heterosexual intercourse, they merely choose not to—an overt denial of the Soller-Mihleks' immutable identity (Fairyington, 2015).

The complications *Obergefell v. Hodges* creates for more traditional same-sex couples are numerous. However, the case presents the greatest problems for LGBTQ families and kinship networks that are the most nontraditional or marginalized. The case recognizes the importance of traditional, heteronormative families and is silent on nontraditional queer kinship networks. This is clear in the Court's emphasis on marriages as deeply connected to history and tradition, stability, and social order in *Obergefell*. The case holds, as a constitutional principle, that the "right to marry is a fundamental because it supports a *two-person* union unlike any other in its importance to the committed individuals" (*Obergefell v. Hodges* 576 U.S. ______ (2015), slip op. at 14, emphasis added). According to Daum (2016), language such as this in *Obergefell* "privileges the institution of marriage over alternative familial and personal relationships and forecloses opportunities for a radical reconstruction of the legal institution of marriage" (Daum, 2016, p. 370). For example, the "two-person" language from *Obergefell* seems to foreclose recognition of polyamorous LGBTQ families or other LGBTQ families where children are raised by more than two parents.

This presents legal problems for nontraditional kinship networks that include relationships of affinity in addition to relationships formed by blood or marriage. LGBTQ people have long created families and communities of their own that are not characterized by blood or marriage because of social rejection and stigma, often at the hands of their own biological families (D'Emilio, 1983; Weston, 1991). *Obergefell* presents complications for non-heteronormative families such as these not only because it does not recognize their legitimacy, but also because it solidifies the sanctity of two-person couples who unite in traditional marriage. This presents legal problems for

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

nontraditional families that include heterosexual people as well—families such as the Scarborough family in Hartford, Connecticut. The Scarborough family is a family of eight adults and three children who live in a large home on Scarborough Street in a wealthy residential neighborhood. The family became embroiled in a legal battle in 2014 when their neighbors pressured the city to enforce their neighborhood's zoning laws, which prevent more than two people from living together in a single-family home who are not related by blood, marriage, civil union, or adoption. The conflict was rife with tensions around class and family norms, with neighbors insisting that the family had "cheated" by pooling their resources to purchase a home in a wealthy neighborhood (Yarbrough, 2018, pp. 162–164). The Scarborough family was ultimately able to get the city to drop a lawsuit attempting to remove the family from their home in 2016. However, there are no laws that prevent the state from taking legal action to remove the family from their home in the future (Yarbrough, 2018). Because *Obergefell* limits marriage recognitions to traditional, nuclear families that are headed by two parents, the case does nothing to assist with the legal recognition of queer kinship networks and families such as the Scarborough family. Hence, *Obergefell*, although an important victory for many same-sex couples, is a limited decision that presents problems and complications for both LGBTQ people who have more traditional marriages and LGBTQ and heterosexual families who form non-normative kinship networks.

LGBTQ Family Law and Policy in Social Science

Social science research has played a large role in revealing and challenging the discrimination that LGBTQ families have faced in the past and continue to face under contemporary law and policy. In general, social science studies that examine the relationship between LGBTQ families and the law fall into three categories: (a) studies that analyze the health and well-being of LGBTQ families, (b) studies that examine the formation of LGBTQ families and LGBTQ parenting and family identity, and (c) studies on the relationship between LGBTQ families and the law in social movement politics. Each category of social science scholarship addresses the complications that LGBTQ families face because they still do not have full legal recognition and continue to face discrimination in the wake of major LGBTQ legal rights wins such as *Obergefell v. Hodges*.

Research on Health and Well-Being of LGBTQ Families

Social science research on the health and well-being of LGBTQ families has played a prominent role in framing the debate around LGBTQ family law and policy. This research has been used in court cases that consider the constitutionality of same-sex marriage, other family law court cases that consider how LGBTQ parents influence the health and well-being of children (i.e., in cases that consider whether LGBTQ families are in the best interests of the child), and in legislation concerning the full legal recognition of LGBTQ families. The social science debate on the health and well-being of LGBTQ families has played a particularly large role in the legalization of marriage equality. The dynamics of this debate are perhaps best portrayed in the same-sex marriage cases, such as *Hollingsworth v. Perry*, which challenged California's ban on same-sex marriage (i.e., Proposition 8) in 2009, and *DeBoer v. Snyder*, which challenged Michigan's ban on

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

same-sex marriage in 2012 (*DeBoer v. Snyder* 772 F.3d 388 (2014); Gates, 2015; *Hollingsworth v. Perry* 570 U.S.____ (2013)). Court cases that challenged bans on same-sex marriage such as *DeBoer* and *Hollingsworth* often included expert testimony at the trial phase that considered how same-sex marriage impacts children and whether same-sex parent families harm the health and well-being of children. Court cases, which tend to involve argumentation and theatrics in the consideration of expert testimony, are not always the best forums for determining the legitimacy of social science research on LGBTQ families. However, the same dynamics that surround judgments about expert testimony in court are also present in policy debates at the legislature and the ballot box. For this reason, the perception of expert testimony at court provides a useful window into what legal and political institutions consider when determining the legitimacy of contemporary social science research (Gates, 2015). Importantly, the cases challenging bans on same-sex marriage support the contention that social science research overwhelmingly shows that children of same-sex couples experience the same disadvantages, well-being, and health as children of different-sex couples. When differences do exist they are largely attributable to instability, as when, for example, a family's full legal recognition is in question (Gates, 2015).

Indeed, the amount of social science research that supports the health and well-being of children in lesbian and gay families is astounding. According to a summary of research on the health and well-being of children in same-sex families from Cornell University, out of the 79 studies on this issue as of 2017, only four asserted that children of same-sex parents fare more negatively than children of heterosexual parents (Cornell, 2017). However, all four negative studies had data samples that included a large number of children who had experienced family break-ups—familial instability that has been shown to negatively impact children regardless of a parent's sexual orientation. As a result, the Cornell meta-analysis of contemporary research concluded that as of 2017, over three decades of peer-reviewed "research forms an overwhelming scholarly consensus . . . that having a gay or lesbian parent does not harm children" (Cornell, 2017).

Studies in the Cornell meta-analysis reach this conclusion across multiple methods. For example, Farr (2016) used a longitudinal study that

> "compared outcomes for children, parents, couples, and the overall family system among adoptive families with LG [lesbian or gay] and heterosexual parents at two time points: Wave 1 (W1), when children were preschool-age, and Wave 2 (W2), approximately five years later, when children were in middle childhood" (Farr, 2016, p. 255).

The study finds that children adopted by same-sex and heterosexual parents are equally well adjusted, on average, across development from preschool to middle school (Farr, 2016). By contrast, Bos, Knox, van Rijn-van Gelderen, and Gartrell (2016) compared partner relationships and parent–child relationships in both female same-sex and heterosexual households using the 2011–2012 National Survey of Children's Health data set. Their research involved multivariate analysis and linear regressions and found that there were no differences in outcomes between children of female same-sex and different-sex families (Bos et al., 2016; see also Bos, Kuyper, & Gatrell, 2018).

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

While there are dozens of studies on the health and well-being of same-sex families that span multiple decades, there is much less research on other LGBTQ families, especially families with LGBTQ people of color, transgender and bisexual parents, or nontraditional queer kinship networks such as polyamorous LGBTQ households. For example, researchers have written about the invisibility of bisexual people in LGBTQ parenting research and how many studies on bisexual parents tend to collapse bisexual parents with lesbian and gay parents (Biblarz & Savci, 2010; Ross & Dobson, 2013). Ross and Dobson (2013) identified only two studies that report data related to the outcomes in children raised by bisexual parents. Both studies had bisexual parents in their data sets and did not report different outcomes in children raised by bisexual parents versus children raised by lesbian and gay parents (Costello, 1997; Murray & McClintock, 2005). Similarly, studies that focus on LGBTQ people of color and their families are largely absent in the academic literature (Moore & Brainer, 2013). Those studies that do exist usually do not differentiate by race. This is problematic because racial disparities that exist across families, such as in income, access to benefits, and education, remain mostly unaddressed in health and wellness literature on LGBTQ families. This supports an artificial divide between race, gender, sexuality, and class identity that has the unfortunate consequence of relegating legal and policy discussions into separate spheres, to the detriment of LGBTQ people of color and their families.

As with research on bisexual families, research on the health and well-being of transgender people and their families is limited (Biblarz & Savci, 2010; Stotzer, Herman, & Hasenbush, 2014). However, Stotzer et al. (2014) note that research on transgender parenting overall has "increased exponentially" over the past few decades. Stotzer et al. (2014) completed a literature review of 51 academic pieces on transgender parenting. All but six of the pieces were published after the year 2000. As with studies on same-sex parents, research on the health outcomes of children of transgender parents concludes that a parent's gender identity has "no effect on a child's gender identity or sexual orientation development, nor has an impact on other developmental milestones" and that the vast majority of transgender parents report "good or positive" relationships with their children (Stotzer et al., 2014, p. 2; see also Church, O'Shea, & Lucey, 2014; Erich, Tittsworth, Meyer, & Cabuses, 2008; Freedman, Tasker, & Ceglie, 2002; Green, 1998; Lenning & Buist, 2013; Pyne, 2013; Reisbig, 2007). Other research on trans parenting focuses on the rates of transgender parenting among the general population, how trans parent families challenge gender norms, how discrimination impacts trans families, how the transitioning process impacts identity and family formation, and how social location and race, class, and geography impact trans family experiences (Downing, 2013; Stotzer et al., 2014). Aside from studies on discrimination and the transitioning process, which often indirectly touch upon health and well-being, these studies focus on the unique features of being a trans parent rather than the health and well-being of families that include trans people.

Finally, as with research on bisexual and trans families and families with LGBTQ people of color, research on queer kinship networks that include more than two cohabitating adults is very limited. For example, polyamorous families can encompass LGBTQ people and are often included in academic discussions of queer kinship networks. Contemporary studies do not address the "perspectives, experiences, and insights of children and adults who have grown up in polyfamilies" (Pallotta-Chiarolli, Haydon, & Hunter, 2013, p. 119). The research that does exist

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

focuses on issues relating to disclosure of polyamorous relationships, polyamorous family environments, polyamorous families in media and culture, and the need for more health, legal, and welfare services for polyamorous families (Pallotta-Chiarolli et al., 2013). Research on polyamorous family environments has touched upon the health and well-being of children by highlighting how children may benefit from polyamorous family structures. Benefits include more emotional intimacy due to sex-positive child-rearing environments, more child–parent time, and a greater amount of shared resources (Sheff, 2010).

The lack of research on LGBTQ families that includes people of color, bisexual and trans families, and polyamorous families makes it more difficult to advocate for the rights and full recognition of many LGBTQ families in political and legal institutions. This is especially true in court cases, where assertions that LGBTQ status and non-normative family environments are not in the best interests of the child are most compellingly refuted with data and research. The lack of research on these families also presents a barrier to the creation of fully inclusive public policy. Research on same-sex couples suggests that family stability matters more than having a traditional family household. However, more research is necessary in order to advance the interests of all LGBTQ families in legal and political institutions and refute threats to LGBTQ families, such as Religious Freedom bills that perpetuate falsehoods about the harms LGBTQ people present to children.

Research on LGBTQ Parenting and Family Identity and Family Formation

In addition to social science research on health and well-being, there is growing research that examines LGBTQ parenting and family identity and formation. These studies focus on the lived experiences of LGBTQ families as they engage in daily life and interact with legal and political institutions and examine how these experiences contribute to identity and family formation (see, e.g., Anderson, 2016; Berkowitz & Ryan, 2011; Connolly, 2002; Gash & Raiskin, 2018; Richman, 2002, 2009; Say & Kowalewski, 1998). Although these studies delineate that LGBTQ people still live as "fragmented citizens" who lack full legal recognition and regularly experience family-based discrimination, they also illuminate how positive experiences with legal and political institutions impact LGBTQ family formation and identity (Engel, 2016). According to these studies, LGBTQ family formation and identity is impacted by conflicting and paradoxical experiences with institutions and state officials.

For instance, Gash and Raiskin (2018) analyze interviews conducted with 31 lesbian and gay adults and 6 children in Oregon in order to understand how legal status ambiguity impacts lesbian and gay parenthood. Legal status ambiguity refers to the ambivalence and hostility many lesbian and gay parents face when claiming family status in society as well as in legal and political institutions. One manifestation of legal status ambiguity occurs because laws governing second-parent adoption vary by state. Many of Gash and Raiskin's (2018) interviewees reported experiencing stress and anxiety around interstate and international travel for this reason. Often, LGBTQ families live their daily lives with the full recognition and acceptance of their friends, neighbors, and local institutions. However, this recognition can be interrupted at any moment by officials and institutions who question the legitimacy of their family status. While crossing an international border, one couple in Gash and Raiskin's (2018) study "was repeatedly questioned

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

by a customs official about their relationship with their son since she did not understand or believe that both women were his parents" (Gash & Raiskin, 2018, p. 93). According to the couple, the official proceeded to question their son's gender even though the information was clear on his passport, in order to harass the family. Experiences such as this shape lesbian and gay family identity as one of both inclusion/acceptance and exclusion/denial. The surprise and shame of having one's family status challenged is exacerbated by cases such as *Obergefell v. Hodges*, which has led many lesbian and gay parents to assume that their parental rights are resolved and protected, when, in fact, they are not. Gash and Raiskin (2018) argue that this has "rendered parents in some states vulnerable to challenges that will strip them of their parental rights" (Gash & Raiskin, 2018, p. 113; see also Padavic & Butterfield, 2011, which examines how nonbiological co-parents in lesbian relationships construct parental identity amid social, political, and legal uncertainty).

Other studies illuminate how LGBTQ family identity and formation are shaped by different political and legal contexts. Pinello (2016) delineates how cohabitating couples were impacted in conservative and rural states that passed Super DOMAs before the legalization of same-sex marriage. Super DOMAs were amendments to state constitutions that banned the recognition of all forms of relationship rights, including civil unions and domestic partnerships. Through 203 in-depth interviews across six states, Pinello (2016) shows how same-sex couples often choose to live more open lives as proud LGBTQ people in an everyday challenge to legal and political regimes that refused to recognize the legitimacy of their relationships (Pinello, 2016, p. 63). In addition, Anderson (2016) examines how same-sex couples' motivations for marrying were impacted by the varying degrees of oppression they experienced based on socio-legal context prior to the nationalization of marriage. Anderson (2016) draws on surveys of same-sex couples who married under different circumstances in San Francisco, Portland, Massachusetts, and Utah. The study finds that these different socio-legal contexts "played a powerful external role in shaping motivations to marry" (Anderson, 2016, p. 377). Couples who married in Utah, which had the most restrictions on same-sex couple recognition of the cases in Anderson's (2016) study, were more likely to say that they were motivated to marry to secure legal protections. By contrast, couples who married in San Francisco during the brief period in 2004 when then-mayor Gavin Newsom started issuing marriage licenses, were the least likely to say that they married for legal protections and the most likely to say they married to make a political statement. Gavin Newsom began issuing marriage licenses for a short period of time in 2004 to call public and political attention to the inequities caused by bans on same-sex marriage. The marriages were later voided by the California Supreme Court. Anderson (2016) argues that how same-sex couples understood and identified with marriage differed depending on whether couples lived in a locality where legal recognition afforded more protection against discrimination or lived in a locality where marriages were granted for purely political reasons (Anderson, 2016; see also Goldberg, Downing, & Moyer, 2012, who examine gay men's different motivations for pursuing parenthood).

Other studies examine how attempts to gain legal recognition for LGBTQ parents are embedded in problematic state marriage and family regimes. For instance, Smith (2005) examines the court decision *Elisa B. v. Superior Court*, which was hailed as a legal victory by LGBTQ social movement organizations. The case extended equal recognition of parental rights and obligations to same-

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

sex couples in California in 2005. Smith (2005) argues that *Elisa B.* was not only a legal victory, it was also "shaped by an extremely influential political ideology, namely, the neoliberal philosophy of the postwelfare order" (Smith, 2005, p. 829). The case was a victory because it recognized a nonbiological parent in a same-sex couple as a social parent, extending legal parentage. However, the case was also deeply problematic because it extended legal parentage within the context of state-enforced, mandatory child support obligations on welfare recipients. According to Smith (2005), this context shows that the case was not only about challenging traditional understandings of family embedded in family law, it was also about state intervention into and regulation of family life for households "that turn to governmental agencies for poverty assistance" (Smith, 2005, p. 848).

Smith (2005) echoes concerns of critical race theorists and feminists about the over-regulation and surveillance of minority families when they seek welfare and housing benefits, and extends these concerns to same-sex families. Yet Smith's (2005) use of critical race theory to analyze the implications of extending legal parentage for same-sex couples also highlights another glaring shortcoming in contemporary LGBTQ family law research on identity and formation: virtually all of the studies on this matter are about the experiences of white same-sex couples. LGBTQ people of color, trans families, bisexual families, and non-heteronormative queer families are largely absent in scholarship on LGBTQ family formation and identity. There are some important exceptions. For instance, Cahill, Battle, and Meyer (2003) examine black LGBT parenting practices and experiences using data from the 2000 Black Pride survey. Cahill et al. (2003) find that black LGBTQ parents may be disproportionately harmed by homophobic laws and policies because parenting is more common among black LGBTQ people than white LGBTQ people. This is especially true when states allow adoption and foster care agencies to refuse to place children with LGBTQ people under expansive religious freedom laws. According to Cahill et al. (2003),

> "coupled with other factors, such as the overrepresentation of Black children in the foster care system, the greater prevalence of Black LGBT parents indicates that anti-gay parenting policies may threaten the Black community as a whole by significantly reducing the potential pool of foster and adoptive parents" (Cahill et al., 2003, p. 94).

Furthermore, Greene (2018) conducted ethnographic research on queer and trans youth of color in Chicago's LGBTQ neighborhood (i.e., Boystown) that examines the formation of "queer street families." These families hang out and care for one another in an increasingly commercialized setting where they lack access to many of the neighborhood's businesses and institutions (Greene, 2018, pp. 168–169). Greene (2018) argues that "queer street families" are a "variation on the 'chosen families' that have become less prominent in the wake of the legalization of same-sex marriage," but nevertheless are an integral part of the history and community that characterizes queer and trans relationships. With few exceptions (such as the Cahill et al. (2003) and Greene (2018) studies) research on LGBTQ family identity and formation that includes LGBTQ experiences beyond those of white same-sex couples is severely limited.

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

Studies on LGBTQ Families and Social Movement Politics

As the previous sections have shown, the research that does exist on LGBTQ families and parenting tends to highlight the experiences of white, married couples and their children at the expense of other LGBTQ families. This is especially true of social science research on LGBTQ families and social movement politics. There are a number of mass market books on social movement politics and same-sex marriage that are written by activists and attorneys who have served as national leaders in the struggle for same-sex marriage (see, e.g., Becker, 2015; Cathcart & Gabel-Brett, 2016; Kaplan & Dickey, 2015; Solomon, 2014). These books focus largely on national campaigns, national organizations, or court cases that made it before the U.S. Supreme Court. In addition to these mass market books, there are also a variety of academic books and articles that examine same-sex marriage and social movement politics (see, e.g., Anderson, 2006; Cummings & NeJaime, 2010; Dorf & Tarrow, 2014; Fisher, 2009; Goldberg-Hiller, 2004; Hull, 2004; Klarman, 2014; Mello, 2016; Pinello, 2006; Richman, 2014). Indeed, most scholarship on social movement politics and LGBTQ families focuses on same-sex marriage. However, there is a growing body of scholarship that examines LGBTQ families and their political and social movement struggles for parental rights and family recognition beyond marriage (see, e.g., Ball, 2012; Richman, 2009; Stone, 2012).

Studies on the social movement politics of same-sex marriage include those that seek to understand the political and legal dynamics of the struggle for marriage equality and those that critique marriage equality as a social movement strategy. Research that examines the legal and political dynamics of same-sex marriage includes Dorf and Tarrow's (2014) study, which finds a triangular relationship among the social movement organizations involved in the marriage equality struggle. Under this triangular relationship, same-sex marriage became a major political, social, and legal policy because of the efforts of grassroots LGBTQ people and countermovement organizations rather than due to the strategic decision-making of LGBTQ social movement organizations. Specifically, anti-same-sex marriage laws initiated by countermovement organizations, such as the federal Defense of Marriage Act and state bans on same-sex marriage, "triggered a 'cycle of contention' that mobilized LGBT everyday activists to urge movement organizations to take up the cause of same-sex marriage" (Dorf & Tarrow, 2014, p. 450). Another important study on the politics of same-sex marriage is Keck's (2009) article on how judicial decisions have impacted the legalization of same-sex marriage. Keck (2009) argues that judicial decisions have served as a double-edged sword, both providing an avenue for the legalization of marriage equality but also bolstering countermovement mobilization. The article is particularly useful for its summary of a long-standing scholarly debate on the utility of the law in struggles for social change, a debate that has, at times, centered on the struggle for marriage equality (Keck, 2009, p. 152).

Critiques of the social movement politics of same-sex marriage examine how the overwhelming focus on same-sex marriage has marginalized other important LGBTQ political struggles, including struggles to gain full acceptance and recognition of LGBTQ families, and how marriage does little to alter the lived realities of low-income and multiply marginalized LGBTQ people (see, e.g., Franke, 2015; Kandaswamy, 2008; Montegary, 2015; Spade, 2015). Much of this scholarship draws from and extends critical race and critical feminist scholarship that emphasizes limits to

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

the pursuit of social change through individual rights in liberation movements. For instance, Kandaswamy (2008) examines how the social movement politics of same-sex marriage mirrors debates around welfare reform in U.S. politics. According to Kandaswamy (2008), same-sex marriage is deeply intertwined with the politics of welfare reform because same-sex marriage extends the hierarchical stratification of rights in the United States, which places social rights and benefits afforded to those who have property and employment (such as retirement and health insurance benefits) above lower-tiered rights associated with welfare and poverty assistance. Same-sex marriage benefits are primarily social rights associated with property and employment rather than lower-tiered rights associated with poverty assistance.

In addition to academic scholarship on the social movement politics of same-sex marriage, there are a limited number of works that examine the social movement politics of LGBTQ parental rights more broadly. Two of the most prominent works on this subject are Richman's (2009) *Courting Change: Queer Parents, Judges, and the Transformation of American Family Law* and Ball's (2012) *The Right to Be Parents: LGBT Families and the Transformation of Parenthood*. Richman (2009) uses archival analysis and interviews to study the functions and dysfunctions of what she terms measured judicial indeterminacy. Measured judicial determination refers to the variation in the treatment of LGBTQ parents in court that stems from the judicial discretion granted to family law judges through subjective standards such as the "best interests of the child" standard. Richman (2009) argues that rights discourse, a discourse long used in LGBTQ social movement politics, has a problematic and paradoxical position in family law context. According to Richman (2009), family law sits at the intersection of the individual/privacy rights and the collective/family. As a result, "in many instances, parents are chastised for advancing . . . rights arguments during a custody case, because it is seen as selfish and inappropriate" (Richman, 2009, p. 17). That is, parents claiming individual parental rights in LGBTQ family law cases have been criticized for being "selfish and inappropriate" because in focusing on individual rights they are not considering the collective well-being of the child in the family environment. Ball (2012) also delineates how the "best interests of the child standard . . . grants judges significant discretion to determine what promotes and undermines the well-being of children," in ways that have both affirmed and denied LGBTQ families (Ball, 2012, p. 15). Yet Ball (2012) also documents how LGBTQ families, through their legal struggles, have fundamentally altered legal and political understandings of what constitutes a family. Thus, Ball (2012) traces the history of legal reforms and demonstrates the role that individual LGBTQ families have played in social movement politics around LGBTQ family recognition.

The Future of Research on LGBTQ Family Law

As this article has shown, there is burgeoning research on LGBTQ family law and policy, particularly when it comes to white, same-sex married couples who are middle- or upper- class and live in more urban or liberal states. However, a glaring pattern also emerges: there is very limited research on LGBTQ families of color, trans and queer families, bisexual families, non-heteronormative families, and families who live in rural and more conservative areas. Research that does exist on these families tends to focus on nuclear families with two-parent households.

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

Furthermore, many of the contemporary studies tend to emphasize national organizations and laws. This is especially true of studies on the politics of same-sex marriage, which almost exclusively focus on national court cases and social movement organizations. This presents a dilemma for social science on LGBTQ family law and policy, which is predominantly determined at the state level and not at the federal level in the United States.

Rather than focusing on impact litigation or federal legislation, scholars should examine how local groups and people are operating in the hyper-localized terrain of family law. Research is especially needed in rural and more conservative states where legal threats to LGBTQ families gain the most traction. Some of the scholars discussed in this article emphasize the importance of local politics in LGBTQ family law by developing concepts such as "judicial indeterminacy" and "legal status ambiguity," which explain how LGBTQ family experiences vary a great deal by context in a society where judges, institutions, and everyday people challenge the legitimacy of LGBTQ families (Gash & Raiskin, 2018; Richman, 2009). Scholarship on law, politics, and social movements should recognize the local nature of LGBTQ family law and policy by emphasizing local campaigns and politics over national agendas because this better reflects the lived experiences of LGBTQ families.

Furthermore, scholars should turn their attention to how post-marriage-equality LGBTQ policy issues impact LGBTQ families and queer kinship networks. More research is needed, for example, on how expansive religious freedom bills harm LGBTQ families. In addition to limiting legal avenues for achieving parentage by allowing adoption agencies to refuse to place children with LGBTQ people, these bills threaten LGBTQ families in other ways. For instance, it is possible that these bills will impede the mobility of LGBTQ families by threatening their right to travel and their right to equal protection of the laws in the U.S. Constitution. Under expansive religious freedom laws, LGBTQ families will face service refusals at businesses such as restaurants and hotels, especially in rural and more conservative states. This will likely hinder their ability to travel freely and their quality of life in these areas of the country. Researchers should also examine how pro-LGBTQ policies such as laws that ban conversion therapy or expand anti-discrimination protections impact LGBTQ families. These laws undoubtedly contribute to the social legitimacy of LGBTQ people and their families by recognizing them as deserving of equal dignity under the law. Future social science research could help legislatures and courts in ways that best benefit LGBTQ families as they consider these laws.

Finally, scholars should expand their studies on LGBTQ family law and policy to include the full spectrum of LGBTQ families and queer kinship networks. There continues to be a need for scholarship on LGBTQ people of color, queer and trans people, and bisexual people in LGBTQ family law and policy. More marginalized people within the LGBTQ community face unique challenges when it comes to family recognition and acceptance that remain invisible in scholarship that predominantly emphasizes the experiences of white, married same-sex couples. Furthermore, there is a significant gap in research on more marginalized, non-heteronormative queer kinship networks, such as families of affinity or the "queer street families" at the center of Greene (2018)'s study. These families continue to directly challenge traditional family norms and are largely ignored in LGBTQ family law and policy, which tends to privilege nuclear, two-parent

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

families and biological parentage. There is an important, growing body of work on LGBTQ family law and policy, but more research is needed in order to understand how all LGBTQ families are impacted by laws and policies that can simultaneously recognize and deny their legitimacy.

References

Acocella, F. R. (2016). Love is love: Why intentional parenting should be the standard for two-mother families created through egg-sharing. *Cardozo Law Review*, *14*, 479–510.

Anderson, E. A. (2006). *Out of the closets and into the courts: Legal opportunity structure and gay rights litigation*. Ann Arbor, MI: University of Michigan Press.

Anderson, E. A. (2016). The state of marriage? How sociolegal context affects why same-sex couples marry. In M. Brettschneider, S. Burgess, & C. Keating (Eds.), *LGBTQ politics: A critical reader* (pp. 374–393). New York, NY: New York University Press.

Baker v. Vermont 744 A.2d 864 (VT 1999).

Ball, C. A. (2012). *The right to be parents: LGBT families and the transformation of parenthood*. New York, NY: New York University Press.

Becker, J. (2015). *Forcing the spring: Inside the fight for marriage equality*. New York: Penguin Books.

Berkowitz, D., & Ryan, M. (2011). Bathrooms, baseball, and bra shopping: Lesbian and gay parents talk about engendering their children. *Sociological Perspectives*, *54*, 328–350.

Biblarz, T. J., & Savci, E. (2010). Lesbian, bisexual, and transgender families. *Journal of Marriage and Family*, *72*(3), 480–497.

Bixby, S. (2019, May 15). Trump administration to LGBT couples: Your “out of wedlock” kids aren’t citizens *<https://www.thedailybeast.com/state-department-to-lgbt-married-couples-your-out-of-wedlock-kids-arent-citizens>*. *The Daily Beast*.

Boggis, T. (2001). Affording our families: Class issues in family formation. In M. Bernstein & R. Reimann (Eds.), *Queer families, queer politics: Changing culture and the state* (pp. 175–181). New York: Columbia University Press.

Bos, H. M. W., Knox, J. R., van Rijn-van Gelderen, L., & Gartrell, N. K. (2016). Same-sex and different-sex parent households and child health outcomes: Findings from the National Survey of Children’s Health. *Journal of Developmental and Behavioral Pediatrics*, *37*(3), 179–187.

Bos, H. M. W., Kuyper, L., & Gatrell, N. K. (2018). A population-based comparison of female and male same-sex parent and different-sex parent households. *Family Process*, *57*(1), 148–164.

Bottoms v. Bottoms 457 S.E.2d. 102 (Virginia 1995).

Brower, T. (2017). What judges need to know: Schemas, implicit bias, and empirical research on LGBT parenting and demographics. *DePaul Journal of Women and Law*, *7*(1), 1–58.

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

Cahill, S., Battle, J., & Meyer, D. (2003). Partnering, parenting, and policy: Family issues affecting black lesbian, gay, bisexual, and transgender (LGBT) people. *Race and Society*, *6*, 85–98.

Carbone, J., & Cahn, N. (2016). The marital presumption. *University of Missouri, Kansas City Law Review*, *84*(3), 663–674.

Cathcart, K., & Gabel-Brett, L. (2016). *Love unites us: Winning the freedom to marry in America*. New York: The New Press.

Church, A., O'Shea, D., & Lucey, J. V. (2014). Parent–child relationships in gender identity disorder. *Irish Journal of Medical Science*, *183*, 277–281.

Clifford, S., & Silver-Greenberg, J. (2017, July 21). Foster care as punishment: The new reality of "Jane Crow." *<https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html>* *New York Times*.

Connolly, C. (2002). The voice of the petitioner: The experiences of gay and lesbian parents in successful second-parent adoption proceedings. *Law & Society Review*, *36*(2), 325–346.

Cornell University Public Policy Research Portal. (2017). What does research say about the well-being of children with gay or lesbian parents *<https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-wellbeing-of-children-with-gay-or-lesbian-parents/>*.

Costello, C. Y. (1997). Conceiving identity: Bisexual, lesbian, and gay parents consider their children's sexual orientations. *Journal of Sociology and Welfare*, *24*(3), 63–89.

Cummings, S. L., & NeJaime, D. (2010). Lawyering for marriage equality. *UCLA Law Review*, *57*, 1235–1331.

Dalton, S. E. (2001). Protecting our parent–child relationships: Understanding the strengths and weaknesses of second-parent adoption. In M. Bernstein & R. Reimann (Eds.), *Queer families, queer politics: Changing culture and the state* (pp. 201–220). New York: Columbia University Press.

Daly v. Daly 715 P.2d 56, 59 (Nevada 1986).

Daum, C. W. (2016). Marriage equality: Assimilationist victory or pluralist defeat? In M. Brettschneider, S. Burgess, & C. Keating (Eds.), *LGBTQ politics: A critical reader* (pp. 353–373). New York, NY: New York University Press.

DeBoer v. Snyder 772 F.3d 388 (2014).

D'Emilio, J. (1983) *Sexual politics, sexual communities*. Chicago, IL: University of Chicago Press.

Dorf, M. C., & Tarrow, S. (2014). Strange bedfellows: How an anticipatory countermovement brought same-sex marriage into the public arena. *Law & Social Inquiry*, *39*(2), 449–473.

Dowd, R. (2018). Same-sex couples more likely than straight couples to raise adopted children. *The Williams Institute: UCLA School of Law*, Press Release, July 31.

Downing, J. B. (2013). Transgender-parent families. In A. E. Goldberg & K. R. Allen (Eds.), *LGBT-parent families: Innovations in research and implications for practice* (pp. 105–116). New York: Springer.

Engel, S. M. (2016). *Fragmented citizens: The changing landscape of gay and lesbian lives*. New York, NY: New York University Press.

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

Erich, S., Tittsworth, J., Meyer, S. L. C., & Cabuses, C. (2008). Family relationships and their correlations with transsexual well-being. *Journal of GLBT Family Studies*, *4*(4), 419–432.

Eskridge, W. (2012). Family law pluralism: The guided-choice regime of menus, default rules, and override rules. *Georgetown Law Journal*, *100*, 1881–1987.

Fairyington, S. (2015, November 2). Should same-sex couples receive fertility benefits? <https://well.blogs.nytimes.com/2015/11/02/should-same-sex-couples-receive-fertility-benefits/> *New York Times*.

Farr, R. H. (2016). Does parental sexual orientation matter? A longitudinal follow-up of adoptive families with school-age children. *Developmental Psychology*, *53*(2), 252–264.

Fisher, S. (2009). It takes (at least) two to tango: Fighting with words in the conflict over same-sex marriage. In S. Barclay, M. Bernstein, & A. Marshall (Eds.), *Queer mobilizations: LGBT activists confront the law* (pp. 231–256). New York, NY: New York University Press.

Franke, K. (2015). *Wedlocked: The perils of same-sex marriage*. New York, NY: New York University Press.

Freedman, D., Tasker, F., & Di Ceglie, D. (2002). Children and adolescents with transsexual parents referred to a specialist gender identity development service: A brief report on key developmental features. *Clinical Child Psychology and Psychiatry*, *7*(3), 423–432.

Fuchs, E. (2014, February 21). This nasty court case helped make surrogacy illegal in New York <https://www.businessinsider.com/the-case-of-baby-m-2014-2>. *Business Insider*.

Gash, A., & Raiskin, J. (2018). Parenting without protection: How legal status ambiguity affects lesbian and gay parenthood. *Law and Society Review*, *43*(1), 82–118.

Gates, G. J. (2015). Marriage and family: LGBT individuals and same-sex couples. *The Future of Children*, *25*(2), 67–87.

George, M. (2017). Bureaucratic agency: Administering the transformation of LGBT rights. *Yale Law and Policy Review*, *36*, 83–154.

Goldberg, A. E., Downing, J. B., & Moyer, A. M. (2012). Why parenthood and why now? Gay men's motivations for pursuing parenthood. *Family Relations*, *61*(1), 157–174.

Goldberg, S. K., & Conron, K. J. (2018). How many same-sex couples in the US are raising children? *The Williams Institute: UCLA School of Law*, Report.

Goldberg-Hiller, J. (2004). *The limits to union: Same-sex marriage and the politics of civil rights*. Ann Arbor: University of Michigan Press.

Green, R. (1998). Transsexuals' children. *International Journal of Transgenderism*, *9*(1), 9–13.

Greene, T. (2018). Queer street families: Place-making and community among LGBT youth of color in iconic gay neighborhoods. In M. W. Yarbrough, A. Jones, & J. N. DeFlippis (Eds.), *Queer families and relationships after marriage* (pp. 168–181). New York: Routledge.

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

Haberman, C. (2014, March 23). Baby M and the question of surrogate motherhood <https://www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html>. *New York Times*.

Hansler, J. (2019, May 17). Trump admin is denying citizenship to some children of same-sex couples <https://www.cnn.com/2019/05/17/politics/kiviti-child-us-passport/index.html>. CNN.

Harris, E. A. (2017, June 20). Same-sex parents still face legal complications <https://www.nytimes.com/2017/06/20/us/gay-pride-lgbtq-same-sex-parents.html>. *New York Times*.

Hartocollis, A. (2014, February 9). And surrogacy makes 3 <https://www.nytimes.com/2014/02/20/fashion/In-New-York-Some-Couples-Push-for-Legalization-of-Compensated-Surrogacy.html?hpw&rref=fashion&_r=0>. *New York Times*.

Hollingsworth v. Perry 570 U.S.___ (2013).

Hull, K. E. (2004). *Same-sex marriage: The cultural politics of love and law*. Cambridge, UK: Cambridge University Press.

Human Rights Watch. (2018, July 25). US: Bill advances bias in adoption, foster care <https://www.hrw.org/news/2018/07/25/us-bill-advances-bias-adoption-foster-care>. HRW.org.

Huntington, C. (2015). Postmarital family law: A legal structure for nonmarital families. *Stanford Law Review*, *67*, 167–240.

Kandaswamy, P. (2008). State austerity and the racial politics of same-sex marriage in the US. *Sexualities*, *11*(6), 706–725.

Kaplan, R., & Dickey, L. (2015). *Then comes marriage: United States v. Windsor and the defeat of DOMA*. New York: W. W. Norton.

Keck, T. M. (2009). Beyond backlash: Assessing the impact of judicial decisions on LGBT rights. *Law and Society Review*, *43*(1), 151–186.

Klarman, M. J. (2014). *From the closet to the altar: Courts, backlash, and the struggle for same-sex marriage*. New York: Oxford University Press.

Klezer, A. A. (2015). The need for a more comprehensive de facto parenting definition. *Women's Rights Law Report*, *36*(2), 206–235.

Lenning, E., & Buist, C. L. (2013). Social, psychological, and economic challenges faced by transgender individuals and their significant others: Gaining insight through personal narratives. *Culture*, *Health, and Sexuality*, *15*, 44–57.

Lewis, M. G. (2018, July 11). Republicans vote for "license to discriminate" against LGBT parents <https://www.advocate.com/politics/2018/7/11/republicans-vote-license-discriminate-against-lgbt-parents>. *The Advocate*.

McKinley, J. C. (2014, January 28). NY judge alarms gay parents by finding marriage law negates need for adoption <https://www.nytimes.com/2014/01/29/nyregion/ny-judge-alarms-gay-parents-by-finding-marriage-law-negates-need-for-adoption.html>. *New York Times*.

Marcus, N. C. (2015). Bridging bisexual erasure in LGBT-rights discourse and litigation. *Michigan Journal of Gender and Law*, *22*, 291–344.

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

Mello, J. (2016). *The courts, the ballot box, and gay rights: How our governing institutions shape the same-sex marriage debate*. Lawrence: University of Kansas Press.

Montegary, L. (2015). Militarizing U.S. homonormativities: The making of "ready, willing, and able" gay citizens. *Signs*, *40*(4), 891–915.

Moore, M. R., & Brainer, A. (2013). Race and ethnicity in the lives of sexual minority parents and their children. In A. E. Goldberg & K. R. Allen (Eds.), *LGBT-parent families: Innovations in research and implications for practice* (pp. 133–148). New York: Springer.

Murphy, J. S. (2001). Should lesbians count as infertile couples? Antilesbian discrimination in assisted reproduction. In M. Bernstein & R. Reimann (Eds.), *Queer families, queer politics: Changing culture and the state* (pp. 182–200). New York: Columbia University Press.

Murray, P. D., & McClintock, K. (2005). Children of the closet: A measurement of the anxiety and self-esteem of children raised by a non-disclosed homosexual or bisexual parent. *Journal of Homosexuality*, *49*(1), 77–95.

NeJaime, D. (2015). With ruling on marriage equality, fight for gay families is next. *The Nation*, June 26.

Obergefell v. Hodges 576 U.S. ____ (2015).

Padavic, I., & Butterfield, J. (2011). Mothers, fathers, and "mathers": Negotiating a lesbian co-parenting identity. *Gender and Society*, *25*(2), 176–196.

Pallotta-Chiarolli, M., Haydon, P., & Hunter, A. (2013). "These are *our* children": Polyamorous parenting. In A. E. Goldberg & K. R. Allen (Eds.), *LGBT-parent families: Innovations in research and implications for practice* (pp. 117–132). New York: Springer.

Pinello, D. R. (2006). *America's struggle for same-sex marriage*. New York: Cambridge University Press.

Pinello, D. R. (2016). *America's war on same-sex couples and their families*. New York: Cambridge University Press.

Pyne, J. (2013). *Transforming family: Trans parents and their struggles, strategies, and strengths*. Toronto, ON: LGBTQ Parenting Network, Sherbourne Health Clinic.

Reisbig, A. M. (2007). *The lived experiences of adult children of crossdressing fathers: A retrospective account*. Dissertation, Kansas State University.

Richman, K. (2002). Lovers, legal strangers, and parents: Negotiating parental and sexual identity in family law. *Law and Society Review*, *36*(2), 285–324.

Richman, K. D. (2009). *Courting change: Queer parents, judges, and the transformation of American family law*. New York, NY: New York University Press.

Richman, K. (2014). *License to wed: What same-sex marriage means to same-sex couples*. New York: New York University Press.

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

Riley, J. (2016, October 12). New York family court rules in favor of same-sex second-parent adoption <*https://www.metroweekly.com/2016/10/new-york-family-court-rules-in-favor-of-same-sex-second-parent-adoption/*>. *Metro-Weekly*.

Rivers, D. W. (2013) *Radical relations: Lesbian mothers, gay fathers, and their children in the United States since World War II*. Chapel Hill: University of North Carolina Press.

Roberts, D. E. (2012). Prison, foster care, and the systemic punishment of Black mothers. *UCLA Law Review*, *59*, 1474–1500.

Ross, L. E., & Dobson, C. (2013). Where is the "B" in LGBT parenting? A call for research on bisexual parenting. In A. E. Goldberg & K. R. Allen (Eds.), *LGBT-parent families: Innovations in research and implications for practice* (pp. 87–104). New York: Springer.

Say, E. A., & Kowalewski, M. A. (1998). *Gays, lesbians, and family values*. Cleveland, OH: Pilgrim Press.

Shapiro, J. (2013). The law governing LGBT families. In A. E. Goldberg & K. R. Allen (Eds.), *LGBT-parent families: Innovations in research and implications for practice* (pp. 291–306). New York: Springer.

Sheff, E. (2010). Strategies in polyamorous parenting. In M. Barker & D. Langdridge (Eds.), *Understanding non-monogamies* (pp. 169–181). London, U.K.: Routledge.

Smith, A. M. (2005). Reproductive technology, family law, and the postwelfare state: The California same-sex rights "victories" of 2005. *Signs*, *34*(4), 827–850.

Solomon, M. (2014). *Winning marriage: The inside story of how same-sex couples took on the politicians and pundits—and won*. Lebanon, NH: University Press of New England.

Spade, D. (2015). *Normal life: Administrative violence, critical trans politics, and the limits of law*. Durham, NC: Duke University Press.

Stone, A. L. (2012). *Gay rights at the ballot box*. Minneapolis: University of Minnesota Press.

Stotzer, R. L., Herman, J. L., & Hasenbush, A. (2014). Transgender parenting: A review of existing research. Los Angeles: The Williams Institute.

Troxel v. Granville 530 U.S. 57. (2000).

United States v. Windsor 570 U.S. 744. (2013).

U.S. Citizenship and Immigration Services. (2019). Chapter 3—United States citizen at birth <*https://www.uscis.gov/policy-manual/volume-12-part-h-chapter-3*> (INA 301 and 309).

Wacquant, L. (2009). *Punishing the poor: The neoliberal government of social insecurity*. Durham, NC: Duke University Press.

Weston, K. (1991). *Families we choose: Lesbians, gays, kinship*. New York: Columbia University Press.

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

Wyman, K. (2014). Notice regarding same-sex marriage and domestic partnerships <https://www.sos.wa.gov/corps/domesticpartnerships/notice-regarding-same-sex-marriage-and-domestic-partnerships.aspx>. *Washington State Secretary of State*, March 15.

Yarbrough, M. (2018). Zoning is a way of sorting people: An interview with the Scarborough family. In M. W. Yarbrough, A. Jones, & J. N. DeFlippis (Eds.), *Queer families and relationships after marriage* (pp. 150–167). New York: Routledge.

Notes

1. Florida's ban was a product of the Anita Bryant campaign against LGBTQ people in the state in the 1970s (Shapiro, 2013, p. 296). Anita Bryant was an early leader in the conservative movement against LGBTQ rights who ran a campaign under the name "Save Our Children" to repeal a law prohibiting discrimination based on sexual orientation in one Florida county in the 1970s. Bryant later became a leader in the anti-LGBTQ movement nationally.

2. New York and other states on the East Coast passed laws restricting surrogate parenting contracts in response to the infamous "Baby M" case from 1986—the first contested surrogate parenting case in U.S. history. The case took place in New Jersey and was initiated when a surrogate named Mary Beth Whitehead agreed to give birth to a child for a married couple, William and Elizabeth Stern. Whitehead agreed to a $10,000 payment and, in exchange, was inseminated with William Stern's sperm. After the child was born, Whitehead sued for custody of the child despite the prior surrogate parenting agreement. New Jersey's Supreme Court ultimately ruled, in a unanimous decision, that surrogate parenting contracts were illegal. Legal parentage was awarded to both Whitehead and Stern, with primary custody granted to Stern. The case was widely reported across the United States (it even became the subject of a made-for-TV movie) and ignited public furor over surrogate parenting (Fuchs, 2014; Haberman, 2014).

3. In general, court-ordered adoptions hold more power in other jurisdictions than a birth certificate that lists a nonbiological spouse as a parent.

Printed from Oxford Research Encyclopedias, Politics. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
date: 08 May 2023

2023 WL 2962787
Only the Westlaw citation is currently available.
NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37
Superior Court of Pennsylvania.

Chanel GLOVER, Appellant
v.
Nicole JUNIOR

No. 1369 EDA 2022
|
Filed April 17, 2023

ORDER

PER CURIAM

***1** Upon consideration of the application for reargument, IT IS HEREBY ORDERED:

THAT *en banc* reargument is GRANTED;

THAT the decisions of this COURT filed February 24, 2023, are withdrawn;

THAT the case be listed before the next available *en banc* panel;

THAT Appellant, Chanel Glover, shall file an original and nineteen (19) copies of either the brief previously filed, the brief previously filed together with a supplemental brief, or a substituted Brief for Appellant by May 1, 2023, along with an original and ten (10) copies of the reproduced record. Appellee, Nicole Junior, shall thereafter have fourteen (14) days after service to file an original and nineteen (19) copies of the brief previously filed, the brief previously filed together with a supplemental brief, or a substituted Brief for Appellee. Appellant shall thereafter have seven (7) days after service to file an original and nineteen (19) copies of a reply brief in accordance with Pa.R.A.P. 2113(a), if desired. No other briefs may be filed by the parties without leave of this Court; AND

THAT any substituted or supplemental brief shall clearly indicate on the cover page that it is a substituted or supplemental brief.

All Citations

Not Reported in Atl. Rptr., 2023 WL 2962787

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

2023 WL 2962787
Only the Westlaw citation is currently available.
NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37
Superior Court of Pennsylvania.

CHANEL GLOVER Appellant
v.
NICOLE JUNIOR

No. 1369 EDA 2022
|
Filed 04/17/2023

Appeal from the Order Entered May 4, 2022

In the Court of Common Pleas of Philadelphia County Domestic Relations at No(s): D22048480

BEFORE: BOWES, J., KING, J., and PELLEGRINI, J. *

ORDER

PER CURIAM

***1** Upon consideration of the application for reargument, IT IS HEREBY ORDERED:

THAT *en banc* reargument is GRANTED;

THAT the decisions of this COURT filed February 24, 2023, are withdrawn;

THAT the case be listed before the next available *en banc* panel;

THAT Appellant, Chanel Glover, shall file an original and nineteen (19) copies of either the brief previously filed, the brief previously filed together with a supplemental brief, or a substituted Brief for Appellant by May 1, 2023, along with an original and ten (10) copies of the reproduced record. Appellee, Nicole Junior, shall thereafter have fourteen (14) days after service to file an original and nineteen (19) copies of the brief previously filed, the brief previously filed together with a supplemental brief, or a substituted Brief for Appellee. Appellant shall thereafter have seven (7) days after service to file an original and nineteen (19) copies of a reply brief in accordance with Pa.R.A.P. 2113(a), if desired. No other briefs may be filed by the parties without leave of this Court; AND

THAT any substituted or supplemental brief shall clearly indicate on the cover page that it is a substituted or supplemental brief.

MEMORANDUM BY PELLEGRINI, J.:

Chanel Glover (Glover) appeals from the order entered in the Court of Common Pleas of Philadelphia County (trial court) granting the petitions filed by her former spouse Nicole Junior (Junior) seeking the pre-birth establishment of parentage of the child (Child) conceived through invitro fertilization (IVF) treatment during their marriage. Because we disagree with the trial court's conclusion that Junior's parentage was established by contract, we reverse its order in its entirety.

I.

A.

The relevant facts and procedural history of this case are as follows. Glover and Junior, a same-sex couple, were married in San Bernadino, California in January 2021. They decided to pursue IVF treatment and moved to Philadelphia shortly thereafter to be closer to family. The couple initiated the IVF process through RMA Fertility Clinic and Glover's eggs were retrieved in preparation for fertilization by a sperm donor.

In February 2021, Glover entered into an agreement with Fairfax Cryobank for donated sperm and she was the sole signatory to the contract. (***See*** Fairfax Cryobank Agreement, 2/03/21, at 5). In the agreement, Glover is listed as the "Intended Parent" and she is referred to throughout the document as "the Client"; Junior is listed as the "Co-Intended Parent." (***Id.*** at 1). The contract includes a provision addressing the "Legal Status of Donor-Conceived Children" which states as follows: "**Client will be the legal parent of the child[ren] born to Client** with the use of donated sperm **and will be responsible for their support and custody**. Client may wish to consult legal counsel regarding co-parent rights." (***Id.*** at 3) (emphasis added). The parties jointly chose the sperm donor.

In July 2021, both Glover and Junior signed an agreement with RMA advising of the possibility that Glover could undergo multiple IVF cycles and of the company's refund policy. Glover signed the agreement as the "Patient" and

Junior signed as her "Partner." (RMA Care Share Agreement, 7/11/21, at 2).

2** Glover became pregnant in August 2021, with a due date of May 18, 2022. The couple mutually decided on a name for Child and hired a doula to provide services during the pregnancy. In October 2021, Glover and Junior retained the Jerner Law Group, P.C. as counsel to provide adoption services in anticipation of Junior's adoption of Child. (See*** Engagement Letter, 10/13/21).

On December 5, 2021, the parties contemporaneously executed separate affidavits wherein they acknowledged that Glover is the biological mother of Child. The affidavits essentially mirror one another and Glover's affidavit provides in pertinent part:

* * *

> 2. **I am married** to Nicole Shawan Junior and **we intend to remain a committed couple**.
>
> 3. I am seeking to have **my spouse**, Nicole Shawan Junior **adopt this child** in order to provide this child with the legal stability of two parents.
>
> 4. I understand that this means that Nicole Shawan Junior will become a legal parent, with rights equal to my rights as a biological parent.
>
> 5. I understand that this means Nicole Shawan Junior will have custody rights and child support obligations to this child [if] we ever separate in the future.

* * *

> 7. **I understand that an adoption decree is intended to be a permanent court order**, which cannot be changed or undone in the future.

* * *

> 10. I want Nicole Shawan Junior to become a legal parent to this child because I believe it is in the best interests of the child.

(Affidavit of Glover, 12/05/21) (emphasis added). Additionally, both Glover and Junior averred that they "have been advised of [the] right to seek separate legal counsel on the issue of this adoption and I have chosen not to seek outside counsel beyond Jerner Law Group, P.C." (Affidavits of Glover and Junior, at ¶ 8).

B.

The couple experienced marital issues and in January 2022, Junior moved from their shared bedroom into their basement. Junior traveled to Portland and advised Glover that she intended to move out of their residence when the lease expired in July 2022. Glover stopped advising Junior of her obstetrics appointments and cancelled all other joint plans concerning the pregnancy, including a baby shower. Glover also informed Junior that she no longer intended to go forward with adoption proceedings.

Glover filed a complaint in divorce on April 18, 2022. Junior filed a petition seeking the pre-birth establishment of parentage, along with an emergency petition to establish the same. After a hearing on May 3, 2022, the trial court entered an order granting Junior's petitions holding that she is the legal parent of Child. The order directed Glover to inform Junior of when she goes into labor and provided that Junior be allowed access to Child. The trial court ordered Glover to list Junior as Child's second parent on the birth certificate and on the birthing parent's worksheet provided by the state. (***See*** Order 5/04/22). The court advised that its order could not be construed as a custody order, and that the parties may file a custody complaint when appropriate. [1] Glover timely appealed and she and the trial court complied with Rule 1925. ***See*** Pa.R.A.P. 1925(a)-(b).

In its Rule 1925(a) opinion, the trial court held that Junior is the legal parent of Child pursuant to the law of contracts because the parties "formed a binding agreement for Junior, as a non-biologically related intended parent, to assume the status of legal parent to Child through the use of assistive reproductive technology." (Trial Court Opinion, 8/01/22, at 9-10; ***see id.*** at 7). The court reached this conclusion because the then-married parties, "jointly consulted with and executed contracts with a fertility clinic (RMA), a sperm bank (Fairfax Cryobank) and later a doula in preparation for childbirth ... [and] both Glover and Junior signed affidavits which memorialized their joint intent to have Junior adopt the Child[.]" (***Id.*** at 9). The court also made clear that it based its decision solely on the law of contracts as interpreted by established Pennsylvania caselaw and not on any other legal doctrine. (***See id.*** at 13).

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

II.

3** On appeal, Glover contends the trial court erred in determining that Junior is Child's legal parent because it summarily concluded, without factual or legal support, that Junior is Child's legal parent without identifying a supporting contract theory or providing the terms of an enforceable contract that would give legal rights to Junior. (See*** Glover's Brief, at 24).[2] Glover also maintains that the trial court improperly found waiver of her challenge to its subject matter jurisdiction to rule on Junior's petitions and contends the issue of parentage was not ripe for review. (***See id.*** at 4). Glover argues that absent successfully pursuing parentage through the adoption process, Junior has no legal status regarding Child. (***See id.*** at 21-38).

A.

Parentage of a child is typically established "through a formal adoption pursuant to the Adoption Act[3], or when two persons contribute sperm and egg, respectively, either through a sexual encounter or clinical setting[.]" ***C.G. v. J.H.***, 193 A.3d 891, 803 (Pa. 2018). However, because of the "increased availability of reproductive technologies to assist in the conception and birth of children, the courts are recognizing that arrangements in this latter context may differ and thus should be treated differently than a situation where a child is the result of a sexual encounter." ***Id.*** Because the willingness of persons to act as reproductive donors and gestational carriers is dependent at least in part on extinguishment of their parental claim to any resulting child and of any obligation to provide the child with financial support, "contracts regarding the parental status of the biological contributors ... [must be] honored in order to prohibit restricting a person's reproductive options." ***Id.*** at 903-04 (citation omitted). Moreover, after a child is conceived through the use of a surrogate and an egg donor, both of whom contracted away any parental rights to the child, the non-biologically related intended parent's contract to assume the role of legal parent is enforceable. ***See*** ***In re Baby S.***, 128 A.3d 296, 298 (Pa. Super. 2015). This issue has been considered in several different contexts.

In ***Ferguson***, our Supreme Court considered the enforceability of an oral agreement pertaining to parentage between the two biological parents – the sperm donor and the prospective mother. The parties agreed that the donor would provide sperm for mother's IVF treatment and relinquish any rights arising from his biological paternity of the resultant child(ren). In exchange, mother agreed not to seek child support from him. ***See id.*** at 1241. Mother gave birth to twins and the parties acted consistently with their agreement for approximately five years, when mother filed for child support. Our Supreme Court held that the parties' agreement was binding and enforceable against the biological father and that mother was barred from seeking child support. ***See id.*** at 1248.

In ***In re Baby S.***, we considered the establishment of parentage by contract in the context of a surrogacy arrangement. In that case, husband and wife entered into a service agreement for IVF treatment with a company that coordinates with gestational carriers. The agreement identified husband and wife as the "Intended Parents" and they were matched with a gestational carrier. The couple hired counsel to represent them through the surrogacy process and wife made clear that she wanted to be named the mother on the child's birth certificate without having to adopt the child.

4** Husband and wife also executed an agreement with an anonymous egg donor providing that, "the Intended Mother shall enter her name as the mother and Intended Father shall enter his name as the father **on the birth certificate of any Child born from such Donated Ova** ... Donor understands that the Intended Parents shall be **conclusively presumed to be the legal parents** of any Child conceived pursuant to this Agreement." ***Id. at 299–300 (record citation omitted) (emphasis added).

The husband and wife additionally entered a contract with a gestational carrier identifying them as the intended parents, obligating them to "accept custody and legal parentage of any Child born pursuant to this Agreement" and averring that the intended mother wished to be the mother of a child who was biologically related to her husband. ***Id.*** at 300. The agreement made plain that the gestational carrier would have no parental rights or obligations with respect to any child conceived pursuant to the contract.

The surrogate became pregnant with an embryo created from father's sperm and the egg donor's egg. Although wife primarily financed the procedure, she refused to sign the necessary documentation to record her name on child's birth certificate because of marital difficulties. While pregnant, the gestational carrier sought a court order declaring husband

and wife to be the legal parents of the child. ***See id.*** at 301. When child was born, the gestational carrier was named as the mother and during the ensuing court proceedings, wife argued that the gestational carrier contract and related agreements were unenforceable. The trial court disagreed, and entered an order confirming wife as the legal mother of Child, a non-biological related person. ***See id***. at 298. We affirmed the trial court's order confirming her parentage on appeal.

Finally, in ***C.G.***, our Supreme Court considered the issue of parentage by contract where a former same-sex partner asserted standing to seek custody as the parent of a child conceived through use of a sperm donor during her long-term non-marital relationship with the biological mother. In holding that she did not, the Court opined that the former partner was not a "parent" because she had no biological connection to the child, had not officially adopted the Child, and had not entered into the type of contract that our Courts have recognized as affording legal parentage through contract. ***See id.*** at 442-43. The Court denied standing to C.G. despite the fact that she had resided with the biological mother and the child for five years. In doing so, the Court observed that "the case law of this Commonwealth permits assumption or relinquishment of legal parental status, under the **narrow circumstances** of using assistive reproductive technology, **and forming a binding agreement** with respect thereto." ***Id.*** at 904 (emphasis added).

What those cases teach us is that "there appears to be little doubt that the case law of this Commonwealth permits assumption or relinquishment of legal parental status, under the narrow circumstances of using assistive reproductive technology, and forming a binding agreement with respect thereto." ***C.G***. at 904. However, absent an enforceable contract, a same-sex partner does not have custody rights to a child even though she lived with child and former partner for five years. The question in this case then is whether there was an enforceable contract in place that conferred parental rights on Junior. We can find none.

***5** None of documents involved in this case identify Junior as the legal parent to Child. Junior was not a party to the Fairfax Cryobank sperm donation agreement that referred to Glover as the legal parent. Though both Glover and Junior signed an agreement with RMA regarding IVF, Glover signed the agreement as the "Patient" and Junior signed as her "Partner." It was not an agreement intended to confer any parental rights on Junior, but to explain the procedure and the obligation for payment of fees.

In the affidavits and retainer agreement each signed with the Jerner Law Group, there was no requirement that Junior be listed on Child's birth certificate and no waiver of the adoption process. To the contrary, those affidavits and retainer agreement demonstrate that the parties intended that a formal adoption process was necessary before any legal parentage rights could be conferred on Junior.[4] Because Junior has no legal rights concerning Child in the absence of adoption as contemplated by the parties, we reverse the order of the trial court in its entirety.[5]

***6** Order reversed. Jurisdiction relinquished.

Judgment Entered.

Joseph D. Seletyn, Esq. Prothonotary

Judge King joins the memorandum.

Judge Bowes files a dissenting memorandum.

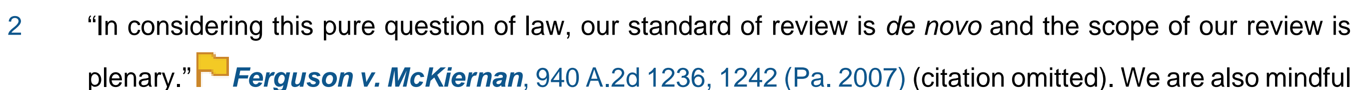
All Citations

Not Reported in Atl. Rptr., 2023 WL 2962787

Footnotes

* Retired Senior Judge assigned to the Superior Court.

1 Child was born on May 25, 2022, and Junior initiated custody proceedings shortly thereafter.

2 "In considering this pure question of law, our standard of review is *de novo* and the scope of our review is

plenary." ***Ferguson v. McKiernan***, 940 A.2d 1236, 1242 (Pa. 2007) (citation omitted). We are also mindful

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

that in considering the language of a contract, we must construe it only as written and may not modify the plain meaning under the guise of interpretation. ***See*** ***Sw. Energy Prod. Co. v. Forest Res., LLC***, 83 A.3d 177, 187 (Pa. Super. 2013).

3 23 Pa.C.S. §§ 2101-2938.

4 The dissent posits that this is the perfect opportunity for our Supreme Court to adopt "intent-based parentage" to determine whether the parties had entered into a contract affording legal parentage. Even though it acknowledges that our Supreme Court has not adopted an "intent-based parentage," the dissent apparently adopts that approach by focusing on the purported emotional roles played by the parties during their relationship, as represented by Junior, rather than on the meaning of the words contained in the documents to see if there was an agreement regarding parentage. Although they could have easily chosen to include in the affidavits or other document a requirement that Junior be listed on Child's birth certificate without the need for an adoption process (as Mother and Father did in ***In re Baby S.***), the parties contemplated that conferring legal parentage to Junior would be through adoption only.

5 Based on our disposition, we need not reach Glover's remaining two claims pertaining to subject matter jurisdiction and ripeness. We briefly note with regard to jurisdiction, our agreement with the trial court that given the unique circumstances of Child's conception and birth, coupled with the significance of the issue of parentage to all involved, the trial court acted within the broad scope of its authority pursuant to the Divorce Code to rule on Junior's petition to protect her potential interests. ***See*** 23 Pa.C.S. § 3104(a)(5) (providing trial court in divorce action with broad jurisdiction to rule on "any other matters pertaining to the marriage and divorce ... and which fairly and expeditiously may be determined and disposed of in such action."); ***see also*** 23 Pa.C.S. § 3323(f) (catch-all provision granting trial court in matrimonial cases full equity and jurisdiction to issue orders necessary to protect interests of parties).

We also agree with the trial court that the issue of parentage was ripe for review just three weeks prior to Child's birth, and that this Court in ***In re Baby S.***, recognized a pre-birth cause of action in contract law. (***See*** Trial Ct. Op., at 11-12); ***see also*** ***Del Ciotto v. Pennsylvania Hosp. of the Univ. of Penn Health Sys.***, 177 A.3d 335, 358 (Pa. Super. 2017) (explaining that the ripeness doctrine is premised on policy that courts should avoid premature adjudication of issues so as not to not give answers to academic questions, render advisory opinions or make decisions based on assertions as to hypothetical events).

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FAMILY COURT DIVISION
DOMESTIC RELATIONS BRANCH

CHANEL GLOVER, Appellant	: :	April Term, 2022 No. 8480
v.	: : : :	
NICOLE JUNIOR, Appellee	: :	Superior Court Docket No. 1369 EDA 2022

OPINION

Sulman, J.

The parties to the instant matter are Chanel Glover (hereinafter "Glover") and Nicole Junior (hereinafter "Junior"). According to the undisputed evidence presented, the parties are a same-sex couple who first met at a writers' retreat in or about August of 2019. After meeting, the parties immediately began dating (N.T. 5/3/2022 at 14-15). On January 21, 2021, the parties were married in San Bernardino, California (*see*, Complaint in Divorce filed by Glover at Paragraph 4).

Relevant Factual and Procedural Background

Beginning in or about the fall of 2020, prior to marriage, the parties began talking about having a family (N.T. 5/3/2022 at 15). In early January of 2021, Junior contacted Reproductive Medicine Associates of Southern California ("RMA") via e-mail (*Id.* at 16). RMA is a fertility clinic. The parties attended a consultation at RMA to hear information regarding *in vitro* fertilization ("IVF") and intrauterine insemination ("IUI") and subsequently underwent blood testing. The parties eventually jointly elected to pursue a pregnancy via IVF. Thereafter, they decided to move from California to Pennsylvania

to be closer to family (*Id.* at 17). On or about April 15, 2021, the parties moved to Philadelphia and continued to pursue pregnancy via IVF with the RMA fertility clinic at a Philadelphia area location of the company. Glover's eggs were retrieved via a medical procedure at a location in or around King of Prussia, Pennsylvania. Junior waited in the parking lot along with Glover's mother while the procedure took place. As part of the IVF and pregnancy process, Glover received various hormone injections into her abdomen and her buttocks over a period of three months. These injections were administered to Glover by Junior (*Id.* at 18-19). During this time, Glover also went to RMA for blood testing to measure the progesterone levels in her body. Glover became pregnant in or about July of 2021. Glover and Junior jointly attended Glover's obstetric appointments at Thomas Jefferson (*Id.* at 19-20).

On July 11, 2021, the parties signed a "Care Share Agreement" with RMA. The Care Share Agreement provided "patients undergoing *in vitro fertilization* (IVF) treatment with a plan that allows for the possibility of multiple IVF cycles for a single fee" and, under certain circumstances, would provide for a refund in the event a patient did not deliver a baby. Glover signed the agreement, which identified her as "Patient" and Junior signed the agreement, which identified her as "Partner" (*Id.* at 24; *See also* Exhibit "F"). Glover admits that she signed the Care Share Agreement with RMA (N.T. at 58).

Glover also previously entered into a contract for a sperm donor with Fairfax Cryobank which identified Glover as "Intended Parent" and Junior as "Co-intended Parent". Glover signed this agreement on February 3, 2021 (*Id.* at 26-27; *See also*

Exhibit “E”). Glover forwarded via e-mail a copy of this agreement to Junior. The parties also jointly chose a specific sperm donor from Fairfax Cryobank (N.T. at 25-28).

In early November of 2021, the parties jointly engaged the services of an attorney to assist them in obtaining a second parent adoption (*Id.* at 28-29; *See also* Exhibit “J”). Junior signed the “Confirmation of Representation Agreement” on November 1, 2021 and Glover signed said agreement on November 2, 2021.

On December 5, 2021, Glover signed a document entitled “Affidavit of Chanel Elaine Glover” and Junior signed a document entitled “Affidavit of Nicole Shawan Junior” which memorialized their joint intent to have Junior adopt the child “in order to provide this child with the legal stability of two parents”, intent for Junior to “become a legal parent, with rights equal to” those of Glover, and the intent for Junior to have custodial rights as well as a child support obligation should the parties separate (N.T. at 31-35; *See also* Exhibit “K”).

In January of 2022, the parties jointly contracted the services of a doula named Kimberly Muhammad. Both Glover and Junior signed the “Doula/Client Agreement” which identified both as a “Client” (*Id.* at 27-28; *See also* Exhibit “M”).

The parties also mutually agreed upon a first name, middle name and last name for the child. The agreed upon last name was hyphenated and consisted of each of the parties’ respective last names (*See* Exhibit “V”). Even after separation, Glover advised Junior, that she intended to use the agreed upon name for the expected child.

The parties experienced marital difficulties and sought marriage counseling. Glover described Junior as having “immense emotional needs”, “a lot of triggers” and as “volatile”, “toxic”, “controlling” and “manipulative” (N.T. at 59, 65). On or about January

1, 2022, Junior moved from their shared bedroom into the basement of their shared residence in Philadelphia. Junior testified that even after separation, she continued to read to the child *in utero* (*Id.* at 35-38). On March 17, 2022, Junior, who was out of town at multiple writers' residencies in the Pacific Northwest, advised that she would be returning to Philadelphia on March 19, 2022 and that she intended to move out of the parties' residence when their lease expired on July 31, 2022 (*Id.* at 38-39). At some point, Glover stopped sharing her Google calendar (which contained obstetric appointments) with Junior, ended joint appointments with their doula, and on April 21, 2022, a planned baby shower that the parties previously worked together to arrange was canceled (*Id.* at 41-42, 53-55, 61-62). Further, Glover advised that she no longer intended to proceed with the second parent adoption that the parties had previously agreed upon (*Id.* at 66).

Glover filed a Complaint in Divorce in the Philadelphia Court of Common Pleas on April 18, 2022. On April 27, 2022, Junior simultaneously filed a Petition for Pre-Birth Establishment of Parentage Pursuant to 23 Pa.C.S. §§ 5102(a) and 5324(1) and an Emergency Petition for Pre-Birth Establishment of Parentage Pursuant to 23 Pa.C.S. §§ 5102(a) and 5324(1). The two petitions and associated requests for relief are virtually identical. On May 2, 2022, Glover filed an Answer to Junior's emergency petition. A contested record evidentiary hearing at which each party appeared and was represented by counsel was conducted by the Court on May 3, 2022.

On May 4, 2022, the Court entered an order granting both of Junior's petitions. The May 4, 2022 order provided that: (1) Junior is confirmed as the legal parent of the child conceived during her marriage to Glover via in vitro fertilization (IVF) and due to be born

in May of 2022; (2) Glover shall advise Junior when she goes into labor; (3) both Glover and Junior shall have access to the child after birth consistent with Glover's medical privacy rights and the hospital's policies regarding newborn children, but that this provision shall not be construed as a custody order; (4) Glover shall execute the Commonwealth of Pennsylvania's Birthing Parent's Worksheet indicating that Junior is the child's Other Parent; and (5) the name of Junior shall appear on the child's birth certificate as a second parent. The Court further wrote that when appropriate, a custody complaint may be filed under a custody case number.

On May 23, 2022, Glover, via new counsel, filed a timely Petition for Reconsideration of the May 4, 2022 order, in which she offered numerous new arguments not raised at the May 3, 2022 record hearing.[1] The Court did not rule on the May 23rd Petition for Reconsideration, and Glover filed a timely Notice of Appeal to the Pennsylvania Superior Court on May 26, 2022, along with a six-page Concise Statement of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). On May 26, Glover also filed a petition requesting that this Court stay its May 4, 2022 order

---

[1] The Court is troubled by Paragraph 14 of Glover's Petition for Reconsideration and by Paragraph 11 of the Concise Statement of Errors Complained of on Appeal, in which she purports to summarize the terms of the May 4, 2022 order, but misstates a significant portion of the order. Specifically, Glover inaccurately avers that the May 4th order directed that Junior be present for the birth of the child. Despite Glover's averment, the order provides for no such relief, but only that each party "have access to the child after birth consistent with Ms. Glover's medical privacy rights and the hospital's policies regarding newborn children." It is further noted that the issue of Glover's medical privacy was specifically addressed on the record by the Court at the May 3, 2022 hearing wherein the Court noted Glover's right to medical privacy, raised concerns about the potential for an "incident" and/or an "unnecessarily stressful situation" at the hospital (N.T. at 97-98).

pending the appeal to the Superior Court. This Court denied the May 26, 2022 request for stay on June 2, 2022.

On June 14, 2022, Glover filed with the Superior Court an emergency petition for stay of this Court's May 4, 2022 order, which was entitled "Appellant Chanel Glover's Emergency Application For Stay of May 4, 2022 Order Regarding Pre-Birth Establishment Of Parentage and Preservation of Status Quo By Appellant, Chanel Glover". On June 17, 2022, this Court's May 4th order was temporarily stayed by the Superior Court pending Junior's answer to the stay petition (ordered to be filed on or before June 24, 2022) and Glover's reply to the answer (ordered to be filed on or before July 1, 2022). On July 18, 2022, the Superior Court issued a *per curiam* order granting in-part and denying in-part Glover's emergency petition for stay. In its order, the Superior Court stayed the May 4th order only as to the portion of the order directing that the name of Junior appear on the child's birth certificate as a second parent, while declining to stay the remaining provisions of the May 4th order pending appeal.

In the meantime, on June 23, 2022, Junior filed a Complaint for Shared Physical Custody and a Motion for Expedited Custody Relief, which were docketed at 0C2201448, which is a custody case designation. On June 2, 2022, Junior filed a Motion for Consolidated Case Management and on June 3, 2022, she filed a Petition for Emergency Custody Relief. On June 7, 2022, Junior filed an Amended Complaint for Custody. On June 13, 2022, Glover filed Preliminary Objections to Junior's Custody Complaint and her Amended Custody Complaint, and Preliminary Objections to Junior's Motion for Expedited Custody Relief. On June 22, 2022, Glover filed Preliminary Objections to Junior's June 3, 2022 Petition for Emergency Custody Relief.

<u>Glover's Concise Statement of Errors Complained of on Appeal</u>

In her Rule 1925(b) Statement, Glover alleges, *inter alia*, that: (1) the Court erred in holding that the petition for pre-birth establishment of parentage was properly brought in a divorce action; (2) the Court had no authority to hear and rule upon the petition for pre-birth establishment of parentage as the custody and paternity actions were premature and there is no forum where such an action can be brought prior to birth; (3) a claim for custody was not raised in an answer or counterclaim to the divorce complaint; (4) a paternity action must be filed with the Court setting for the child's name, date of birth and address; (5) the Court erred in confirming Junior as the legal parent of an unborn child; (6) the presumption of paternity is inapplicable to the instant case; (7) paternity by estoppel is inapplicable to the instant case; (8) the Court erred in writing that "when, appropriate, a custody complaint may be filed under a custody case number"; (9) the Court abused its discretion in ordering that Junior's name be included on the child's birth certificate, confirming parentage, and allegedly ordering that Junior be present at birth; and (10) that Junior cannot be a legal parent absent an adoption.

<u>Discussion</u>

1. Junior is the Legal Parent of the Child Pursuant to the Law of Contracts.

Paragraphs 12 k, l, m, and n of the Concise Statement of Errors Complained of on Appeal all involve this court's determination that Junior proved that she is a legal parent of the child based upon the law of contracts. As such, these issues are jointly addressed.

As observed by the Pennsylvania Supreme Court, "the reality of the evolving concept of what comprises a family cannot be overlooked." <u>C.G. v. J.H.</u>, 193 A.3d 891,

900 (Pa. 2018). In the course of addressing the evolving concept of family, Pennsylvania courts have recognized the validity and enforceability of contracts involving assisted reproductive technology. Ferguson v. McKiernan, 940 A.2d 1236 (Pa. 2007) (holding that an oral contract between a biological birth mother and a sperm donor for release of parental rights is enforceable); In Re. Baby S., 128 A.3d 296 (Pa.Super. 2015) (holding that after a child is conceived through the use of a surrogate and an egg donor, both of whom contracted away any parental rights to the child, a non-biologically related intended parent's contract to assume the role of legal parent is enforceable).

The Adoption Act is not the exclusive means by which an individual with no genetic connection to a child can become a legal parent. Nor does the Adoption Act preclude the enforcement of gestational contracts. C.G. v. J.H., 193 A.3d 891, 903 (Pa. 2018).

As stated by the Supreme Court of Pennsylvania:

> [T]here appears to be little doubt that the case law of **this Commonwealth permits assumption** or relinquishment **of legal parental status, under the narrow circumstances of using assistive reproductive technology, and forming a binding agreement with respect thereto**. The courts of this Commonwealth, when faced with the issue and without legislative guidance, have expressly declined to void such contracts as against public policy.

C.G. v. J.H., 193 A.3d 891, 904 (Pa. 2018) (emphasis supplied) (footnote omitted).

While the majority of the Supreme Court in C.G. held that parentage could not, as a broad proposition, be established by intent in all situations where a child is born via assistive reproductive technology, *id*. at 905, the majority opinion of Justice Mundy noted that “[t]here is nothing to suggest in our case law that two partners in a same-sex couple could not similarly identify themselves each as intended parents, notwithstanding the fact that only one party would be biologically related to the child.” *Id.* at Footnote 11.

Further, three Justices in two concurring opinions expressed their belief that parentage may be determined by the intent of parties who create a child together using assisted reproductive technology. Concurring Opinion by Dougherty, J., *id.* at 913; Concurring Opinion by Wecht, J., *id*. at 917.[2] This Court is in accord with the expressions of the concurring Justices and would urge the appellate courts, when presented with a factually appropriate scenario, adopt an intent-based analysis for persons pursuing parentage through assistive reproductive technology.

In the instant matter, it is undisputed that the parties, a married couple, mutually agreed to utilize IVF for the purpose of having a child together. The parties jointly consulted with and executed contracts with a fertility clinic (RMA), a sperm bank (Fairfax Cryobank) and later a doula in preparation for childbirth. The Care Share contract signed by the parties with RMA identifies them as "Patient" and "Partner", while the contract with Fairfax Cryobank identifies them as "Intended Parent" and "Co-Intended Parent". Additionally, both Glover and Junior signed affidavits which memorialized their joint intent to have Junior adopt the child "in order to provide this child with the legal stability of two parents", intent for Junior to "become a legal parent, with rights equal to" Glover's, and the intent for Junior to have custodial rights and a child support obligation should the parties separate (N.T. at 31-35; *See also*, Exhibit "K").

Based upon the undisputed evidence presented, the Court determined that it conclusively established that the parties, a married couple, formed a binding agreement

[2] In his concurring opinion, Justice Dougherty notes concern for the "cramped interpretation of 'parent' under 23 Pa.C.S. § 5324(1), the inevitable result of which will be the continued infliction of disproportionate hardship on the growing number of non-traditional families – particularly those of same-sex couples – across the Commonwealth". Concurring Opinion by Dougherty, J., C.G. at 913-14.

for Junior, as a non-biologically related intended parent, to assume the status of legal parent to the Child through the use of assistive reproductive technology.

Glover's defense to admittedly signing these multiple contracts with multiple parties is that she did so essentially as the result of "being in a codependent and emotionally abusive relationship" (N.T. at 75) and that she was unaware that signing an agreement for fertility treatments would later implicate a dispute concerning parental rights (*Id.* at 77). It is noted here that Glover is an attorney, although she testified that she had only practiced law for one year and had not practiced law in over ten years since. To the extent that Glover alleges she was unable to legally consent to a contract or understand the terms of the contracts she signed, these allegations are either unproven, not credible and waived, as she has not raised the same on appeal.

2. Glover Waived all Issues Challenging the Propriety of Litigating Junior's Parental Claims in this Divorce Action.

Paragraphs 12 a, b, c, and d of the Concise Statement of Errors Complained of on Appeal all involve this Court's determination that it may proceed upon the merits of Junior's requests for relief in the context of a pending divorce action. As such, these issues are jointly addressed.

At trial, Glover only claimed that this action was not ripe for disposition as the Child had not yet been born. Therefore, any challenges to the Court's exercise of its jurisdiction and to its being a proper forum for a decision regarding Junior's rights under contract law have been waived. *See* Pa.R.A.P. 302 (issues not raised in the lower court are waived and cannot be raised for the first time on appeal); Bednarek v. Velazquez, 830 A.2d 1267, 1270 (Pa.Super. 2003) (holding that acquiescence to a procedure employed by the trial court results in waiver of a challenge to that procedure on appeal).

Were these issues not waived, the Court acted within the scope of its equity authority pursuant to the Divorce Code. Section 3323 of the Divorce Code confers full equity power this Court:

(f) Equity power and jurisdiction of the court.--In all matrimonial causes, the court shall have full equity power and jurisdiction and may issue injunctions or other orders which are necessary to protect the interests of the parties or to effectuate the purposes of this part and may grant such other relief or remedy as equity and justice require against either party or against any third person over whom the court has jurisdiction and who is involved in or concerned with the disposition of the cause.

23 Pa.C.S. § 3323(f).

The Court properly determined that a ruling on Junior's rights *vis a vis* a child conceived during the parties' marriage was necessary to protect her interests.

3. Junior's Requests for Relief were Ripe for Disposition.

Paragraphs 12 c, d, and e of the Concise Statement of Errors Complained of on Appeal also involve this Court's determination that it may proceed upon the merits of Junior's requests for relief in the context of an unborn child because the matter was ripe for disposition. As such, these issues are jointly addressed.

The ripeness doctrine is a prerequisite for a court to exercise judicial review and examine the merits of a case. Treski v. Kemper Nat. Ins. Companies, 674 A.2d 1106, 1113 (Pa.Super. 1996). To be ripe, an actual case or controversy must exist at every stage of the judicial process. *Id*. "The basic rationale underlying the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Philadelphia Entm't & Dev. Partners, L.P. v. City of Philadelphia, 937 A.2d 385, 392 (Pa. 2007).

Both of Junior's requests for relief were ripe for disposition because there existed an actual case or controversy between the parties. The dispute between Glover and

Junior, a married couple, was by no means an “abstract disagreement”, but a concrete dispute regarding Junior’s status as a parent of a child whose birth was imminent.

Glover’s challenge to the Court’s ruling ignores the basis upon which a pre-birth contract action may proceed. The legal principles upon which a court may determine the respective rights to legal parental status of married parties do not vary based upon whether the child is already born. Rather, the contracts have already been entered into and the court employs the same legal analysis in determining whether the non-biologically related spouse has assumed legal parental status, under the narrow circumstances of using assistive reproductive technology. The Superior Court recognized a pre-birth cause of action in contract law in In Re. Baby S., 128 A.3d 296 (Pa.Super. 2015) wherein a gestational carrier brought suit against the intended parents prior to the birth of the child she was carrying. The matter was heard by the trial court on its merits and it rendered a decision enforcing the contract entered into by the intended parents after the birth of the child. The fact that the child had not yet been born prior to the commencement of the gestational carrier’s cause of action was no impediment to being a determination that the matter was ripe for adjudication. Similarly, here, the Court did not err in ruling upon Junior’s legal rights three weeks prior to Child’s subsequent birth on May 25, 2022.

Further, courts are routinely called upon to resolve disputes regarding parentage as soon as possible when conflicts arise in order to secure stability and certainty for important rights of children such as inheritance, health insurance benefits, child support, among other rights.

4. The Court Did Not Employ the Doctrines of Presumption of Paternity or Paternity by Estoppel in Determining that Junior is the Legal Parent of the Child.

Paragraphs 12 f and g of the Concise Statement of Errors Complained of on Appeal involve the doctrines of the presumption of paternity and paternity by estoppel. As such, these issues are jointly addressed.

Here, the Court did not employ either of these doctrines in reaching its determination that Junior is the legal parent of Child. Rather, the Court appropriately applied the law of contracts and established Pennsylvania case law to determine that the parties' actions evidenced the intent and the accomplishment of securing Junior's status as a legal parent.

CONCLUSION

For the foregoing reasons, the May 4, 2022 order issued by the trial court in this matter should be affirmed.

BY THE COURT:

Dated: August 1, 2022

____
SULMAN, J.