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PATHS TO PARENTHOOD FOR SAME SEX COUPLES: A LEGAL GUIDE ©
By Linda M. Scaparotti, Esq.¹

How Many Children are Being Raised by LGBT Parents?

No one knows for sure how many children are being raised by LGBT parents, but there are many estimates. According to the 2011 U.S. Census, one quarter of all same sex households have children, approximately 270,000 children, but this does not include single parents or transgender parents, and most definitely is an under-reported number. (Approximately 646,000 same sex households reported.)

According to the Williams Institute, an LGBT think-tank, "Same-sex couples are raising an estimated 200,000 children under age 18, of whom 30,000 are being raised by married same-sex parents. LGBT individuals who are not part of a couple are raising between 1.2 and 2 million children – a wide variable due to the range in estimates of adults who identify as LGBT."²

Gay and lesbian parents are estimated to be raising four percent of all adopted children in the U.S., with the highest number in California, approximately 16,000.

A. Who is a Presumed Parent in California?

Since January 1, 2005, in California, same sex (lesbian) couples who are married or registered domestic partners (RDP's), and to whom a child is born after the date of marriage or registered domestic partnership, while the partners/spouses are living together, are the presumed legal parents of the child. ("Child of the Marriage.") The exact same laws that pertain to heterosexual parents pertain to same sex parents, in California. Also, in keeping with the Family Code, the birth mother has no greater legal rights than the non-biological mother. In the case of dissolution, both parents have equal rights to custody, each can be held responsible for support, etc.

In California, due to the legal presumption of parenthood, both female parents are listed on the child's birth certificate from birth. However, in order to provide children and parents (particularly non-biological parents) with the greatest security and rights possible, a couple must still proceed with a confirmatory adoption if they are registered or married, and if they are not, a second parent adoption. (Both explained below.)

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² "LGBT Demographics: Comparisons Among Population-based Surveys," 2013 National Health Interview Survey.

B. Why Do We Have to Adopt Our Own Child? No Federal Parentage Law or Case
While marriage for same sex couples is now the law of the land, protected constitutionally, and pertaining to all states in the U.S., no such right exists for parenthood for same sex couples. Most couples presume that if their marriage is legal, their parentage as a result of that marriage is legal, but that is not necessarily true. Parentage is determined under state law not federal law. There has been no law or Supreme Court case which nationally protects same sex couples' right to parenthood through marriage for instance. In California, parentage through marriage is protected, but that is not true in all other states or countries. The Federal Government itself has recognized parentage based on marriage, for couples residing in states where parentage is recognized simply by being married when the child is born, and the Federal Government has likewise recognized parentage through registered domestic partnership where the state in which the couple resides so recognizes parentage. The consensus is that a Trans- administration cannot change that Federal recognition, because they have to honor the parentage laws of the underlying state.

While no heterosexual husband has to adopt any child born to the wife during the marriage for any reason, and even though the same sex partner/spouse of a woman who has a child during the cohabitation does not have to adopt the child to be recognized as a parent in the State of California, many states will not recognize parentage based solely on the "child of the marriage" parentage. Since certain other states do not recognize parentage solely based on marriage (nor domestic partner registration), to ensure children and their parents have all of the legal protections needed, particularly for the non-biological parent, the non-biological parent must do a step-parent or confirmatory adoption. This is particularly true for couples who may move to another "bad" state, and for those who travel to or through these states. The adoption decree from California will be recognized by every other state under the Full Faith and Credit Act of the U.S. Constitution.

(Please note, the National Center for Lesbian Rights, the most active organization on behalf of LGBT parentage rights, strongly believes that we must continue with the step-parent adoptions until laws are changed in other states, or there is a challenge and ruling by the US Supreme Court.)

C. Child Born During Marriage/Registration: Confirmatory Adoptions

Adoptions by same sex couples who are married or registered, where the child is born to one during the marriage or registration, are filed under the step-parent adoption law in California, and are called Confirmatory Adoptions. The Modern Family Law Act, which went into effect on January 1, 2015, added Section 9000.5 to the CA Family Law Code, and provides for a quicker, easier adoption process for those co-habiting couples who were married or registered domestic partners at the time the child was born to the couple, no matter how the child was conceived. There is no social worker involved under this procedure, no fees to a social worker, no home visit, no affidavits from other witnesses, no court appearance required. Everything is submitted on paperwork, mainly forms. While this new procedure is supposed to be able to be done by the parents without an attorney, until recently it was this attorney's experience that was not true. This year some clients are able to do their own adoptions because the Judicial Council forms have been changed to be clearer, and most judges and clerks have been properly trained. Those couples who have used a known donor, and especially those who have done a home insemination, should definitely consult with an attorney as the known donor's potential rights must be terminated.

D. Sperm Donors Known and Unknown & Step-Parent Adoption

Unknown or Known Donors Donating Through Sperm Bank

CA Family Code Section 7613(b) provides that any child conceived using the sperm of a donor who provided his sperm to a licensed physician or sperm bank for the purpose of insemination in a woman not his wife, is presumed not to be the natural father of the child. This is obviously to encourage donors to come forward. Any married or registered couple who uses an unknown donor who provided his sperm to a sperm bank or fertility center doctor has the simplest Confirmatory (Step Parent) Adoption to file. This applies to both known and unknown donors as long as the donation is through the sperm bank. (Part of the adoption process requires a letter or declaration from the sperm bank

Home Inseminations with Known Donors

Many lesbian couples do home inseminations with someone they know, and without the provision of the sperm to a licensed physician. Many do this to have a donor who is actually known to them and can be known to the child. Couples also do this to be able to use fresh sperm as fertility rates seem to be higher with the use of fresh sperm. (Until 2013, almost no fertility center, doctor, sperm bank would do inseminations with fresh sperm, and most still won't. The sperm must be quarantined and tested for various diseases.)³

For any couple who does a home insemination with a known donor without any provision of the sperm to a sperm bank, fertility center, or doctor, it is imperative that the couple do a Step Parent Adoption, which can still be a Confirmatory Adoption if the couple is married or registered. Additional documentation, such as a written Donor Insemination Agreement, is required to prove that the donor was always meant to be just that, a donor, and not a parent.

D. Step-Parent Adoptions: Where One in Couple Is Sole Legal Parent

For those couples where one of the members of the married couple, or registered domestic partnership, is the sole legal parent of the child, either through a previous adoption, original sole parentage, or by court decree, the couple will not be able to do the shortened form of adoption, but the slightly lengthier Step-Parent Adoption, which involves a social worker (including fees to the social worker), forms to be filled out for the social worker, affidavits by three witnesses to the adopting parent's ability to parent, a home visit, a Court Report of Adoption by the social worker, a court appearance by all of the parties, in addition to the usual legal paperwork. Most couples have an attorney handle the case, although that is not required.

E. Second Parent Adoptions: Couple Not Married or Registered

For couples who are neither registered or married, a second parent adoption must be done. The process is much more expensive, time consuming, lengthy and invasive. The adopting parent is treated as though she were adopting an unknown child from strangers. There is a longer Adoption Questionnaire, there are two home visits, a full home study, finger printing of the adopting parent (and anyone else living in the home), a criminal background check. The Department of Social Services is involved through their County offices, that is you cannot use a private social worker (or only for a piece of it), and that can be challenging at times. The birth mother, that is your spouse, the mother of your child, has to be counseled two times by another

³ A new law went into effect in California on January 1st, 2013, which allows a woman to be inseminated with fresh sperm from a known donor by a licensed physician, without the requirement of a quarantine and repeat testing, as long as she has previously been exposed to the sperm in a home insemination, and the sperm was previously tested

independent social worker about giving up her child. And while she signs a form saying that she understands she is placing the child in the home of an adopting parent, and giving up her giving up legal rights to her child, she then signs an addendum to the Adoption Placement Agreement stating that she is giving limited consent only to placement of the child for the purpose of independent adoption and affirming that she actually is keeping all of her legal rights.

Who would do this kind of adoption? Anyone who does not want to get married or registered, usually for tax reasons, or for other financial reasons, such as one partner has more debt and the other fears attachment of assets. (For some couples another approach would be to get married or registered but do a prenuptial agreement before registering/marrying, keeping their assets separate (if that is the issue for not getting married).

F. Genetic & Birth Mothers

What about where one woman in the marriage/RDPship "donates" her egg, has it fertilized and then implanted in the uterus of the other spouse/partner? One member of the couple is a genetic parent, and the other is a birth parent. Case law recognizes both of the mothers as having parental rights. Do they need to do anything? In the same way that other same sex couples are advised to adopt, they must take some legal action as well, even if they are registered or married, even though both will go on the birth certificate as "parent." Some practitioners believe the correct legal procedure is a Uniform Parentage Action, which requires an attorney, while others take the simpler Confirmatory (Step Parent) Adoption approach.

G. Three Parents

Often referred to as the "3rd parent law," California Senate Bill No. 274 provides protection for children and families by recognizing legal rights and responsibilities of two or more adults in a child's life. One of the most common scenarios for the application of this law is a lesbian couple and the donor/biological father. The law does not expand parental rights for grandparents or siblings, etc, it allows parenthood only for people who meet the legal definition of a parent under California law. The court still reviews the situation and issues a ruling as to whether to recognize parental rights of the three parents.

H. California's New Assisted Reproduction Law (AB 960)

On January 1, 2016, a new law went into effect in California that better protects families having children through assisted reproduction. The law extends protections to families who conceive through at-home insemination and to unmarried parents. The California statutes include forms that can be used to show the intentions of parents and donors involved in the conception of a child and help protect their rights. The forms should be filled out and signed before conception. There are forms for four different scenarios: Form One is for Two Married or Unmarried People Using Assisted Reproduction to Conceive a Child. Form Two is for Unmarried, Intended Parents Using Intended Parent's Sperm to Conceive a Child. Form Three is for Intended Parents Conceiving a Child Using Eggs from One Parent and the Other Parent Will Give Birth. Form Four is for Intended Parent(s) Using a Known Sperm and/or Egg Donor(s) to Conceive a Child.

I. Surrogacy and the New Family Law

Surrogacy is another way for gay men in particular to become legal parents. CA AB 1217 went into effect on January 1, 2013, and amended California Family Law Code Section 7960 et. seq. We now have clarity and safety for those who are becoming parents through surrogacy. The law provides that any intended parents (gay or straight) may utilize a Uniform Parentage Action

(under the Uniform Parentage Act), to be declared the legal parents of the child prior to the birth of the child, as long as the parties (surrogate=1 party and intended parents =2nd party) are represented by independent counsel, and they sign an Assisted Reproduction Agreement. Both of the intended parents will go on the birth certificate as soon as the baby is born. This UPA action will also have the protection of the Full Faith and Credit Act, and has to be recognized in other states and by the federal government.

Traditional & Gestational Surrogacy

The trend for gay male partners utilizing surrogacy has shifted away from traditional surrogacy, that is where the birth mother becomes pregnant using her own eggs. The court recognizes both concepts of the legal rights of the intended parents, and the legal rights of the traditional surrogate, who may have a strong emotional/physical attachment to the child and wish to keep the child. All fertility centers now use a separate egg donor (with another written agreement) and a gestational surrogate who will carry the child and give birth, but has no genetic connection to the child. Another trend is to have both partners/spouses provide their sperm for insemination of the donated eggs.

International Surrogacy

Many couples, for financial reasons, are going outside of the United States to hire surrogates, India and Nepal being two popular countries for surrogacy. (The author of this article admittedly has strong feminist and class views on this topic, and will not participate in these surrogacies until stronger protections are put in place.)

J. Adoption of Unrelated Children

There are three routes: Private Domestic Adoption, Foster Adoption, and International Adoption.

Private Domestic Adoptions

Both members of a same sex couple are able to adopt children in approximately 13 states, California being one. California prohibits families from advertising for a birth mother, only licensed adoption agencies and adoption facilitators are allowed to do that. Two types: Independent Adoptions where the birth parent(s) place the child for adoption directly with the adoptive family, or Agency Adoptions, where the birth parent(s) relinquish the child to a licensed adoption agency or county adoption agency, which then places the child with the adoptive family. We assume the number of states that will allow this is going to increase with the recognition of marriage nationwide; however, many states felt forced by the Supreme Court to recognize marriage, and did not do it of their own volition. Therefore, if they have any way to not recognize the parentage of same sex couples, they will do so.

Open Adoptions (where the birth parent(s) and adoptive parents meet, exchange information, and the birth mother has continuing contact with the child) are very prevalent. The Judicial Council forms provide for open adoptions by covering issues such as visitation, phone calls, pictures, letters etc. (Family Code section 8616.5.)

Foster Adoptions

Foster adoptions are still a primary way for same sex couples to become parents. Both San Francisco and Alameda Counties are very supportive of and encouraging toward same sex couples adopting through the foster adopt program. This is often the easiest way for couples to adopt, but of course there are issues regarding the children being prenatally

exposed to drugs or alcohol, having a history of abuse and neglect, having developmental disabilities or delayed development. The biological parents may be entitled to visit the child, and the child can be returned to the biological parent(s), depending on their ability to comply with certain requirements regarding sobriety etc and parenting. Because children in the foster-adoption program are all considered to have special needs, the adoptive family is usually eligible for Adoption Assistance Payments, and the children are covered medically through Medi-Cal.

International Adoptions

Currently, it is almost impossible for same sex couples (or individuals) to adopt internationally, due to the ban on adoption by homosexuals. In the past one partner would adopt as a single person and the other would do a step-parent adoption after the child came to the U.S. The home study can not mention the couple's relationship; however, the U.S. has ratified the Hague Convention which requires the social worker to reveal in the report whether the adopting parent is homosexual. The social worker and agency can receive stiff penalties, and removal of licensure, if they suspected the adopting person was gay and didn't reveal it. Additionally, countries have passed specific laws which further limit lesbian and gay peoples' rights to adopt. Many countries have banned adoptions to everyone, gay or straight, due to issues regarding the "export" of their country's children.