Presumed Parentage for Same-Sex Couples

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[NB: This article is in response to an article on Presumed Parentage published in the Summer issue of this newsletter.]

Given the dizzying changes to the rights and responsibilities of same-sex couples over the past ten years, it is no wonder that Maryland practitioners may be confused about how the marital presumption and the question of "legitimacy" of children under Maryland law should be applied to families headed by same-sex couples. Among the most significant of these changes is the right of same-sex couples to marry, which became law in Maryland by popular vote in 2012, and nationwide in 2015, per *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), impact the parentage rights of these couples with children.. In *Obergefell* the U.S. Supreme Court found that same-sex couples are entitled to the full panoply of rights accorded by marriage, and focused on children in these families in particular. The Court said:

> *[t]he States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order…There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives."*

Id. at 2601. The Court made clear that children in families headed by same-sex couples need the same protections as children in families headed by opposite-sex couples, including "recognition, stability and predictability." *Id*. at 2600. Courts around the country are now trying to interpret the *Obergefell* directives in light of their own jurisdiction's laws.

A parent's legal relationship to a child can occur in a number of ways: 1) birth; 2) biology; 3) intent, including *de facto* parentage; 4) marriage to the birth parent; 5) adoption; and 6) marital presumption. Maryland law addresses all of these. Maryland law assumes that a birth mother of a child is the child's legal mother, although we have found no statute or case law that makes this assumption explicit, as other jurisdictions have done. *See, e.g.* D.C. Code Ann. §16-909 (a-1) (1), *a mother child relationship is established by a woman having given birth…* Biology almost always creates a legal relationship between a father and a child, notwithstanding other potential legal relationships. *See Kamp v. Dep't of Human Services*., 410 Md. 645 (Md. Ct. of App. 2009) and *Burden v. Burden*, 179 Md. App. 348 (Md. Ct. Spec. App. 2008) (rebutting marital presumption).

All of these possibilities can apply in Maryland to same-sex couples. Arguably, the Maryland Equal Rights Amendment also bolsters all arguments on behalf of a same-sex couple standing in the same relation to their child as a heterosexual couple. "Equality of rights under the law shall not be abridged or denied because of sex." *Maryland Constitution, Declaration of Rights, Article 46 (1972)*.

A recent Maryland Court of Appeals case, *Conover v. Conover*, 450 Md. 51 (Md. Ct. of App. 2016) enumerated the factors for a non-birth, non-legal "parent" to a child to be found to be a legal parent, essentially pursuant to the implicit intent of the parties raising the child. Md. Code Ann., Fam. Title V, provides the contours of adoption law. A marital presumption that a spouse of a birth mother is the parent of the child can be found at Md. Code Ann., Est. & Trusts §1-206. See also *Sieglein v. Schmidt*, 447 Md. 647 (Md. Ct. of App. 2016). A recent Court of Appeals case interpreting Md. Code Ann., Est. & Trusts § 1-206 (b) held that a spouse of a woman who gave birth to a child not genetically related to either the birth mother or her male spouse, is a parent if that spouse agreed to assisted reproductive means to create the child. *See Sieglein v. Schmidt* at 669-70.

Currently same-sex couples cannot biologically create a child together. But the assumption that all heterosexual couples are each biologically related to their children is incorrect. Many heterosexual couples are infertile. Over 12% of women and over 10% of men battle infertility. Datta, J. et. al., *"Prevalence of infertility and help seeking among 15 000 women and men," Human Reproduction*, Volume 31, Issue 9, 1 September 2016, Pages 2108–2118. Therefore, children in significant numbers of families headed by opposite-sex couples are not genetically related to both parents. Those children are created by a donor egg, donor sperm, or both. Those children, however, are still almost always considered by law to be the children of both parents. A man, who by law is a father, is not subjected to a fertility test to determine whether he can create a child with his female spouse.

Same-sex lesbian parents are in the same position as such a couple. Accordingly, the female spouse of a birth mother should be considered a parent to the same extent as the infertile husband of the birth mother. Currently, married gay male couples who have children together through surrogacy must obtain a court order to insure both of their rights to their child. We believe, however, that a strong argument can be made that the non-genetic parent in such a couple should be afforded the marital presumption.

Why is a *de jure* legal relationship to a child important? There

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are many significant reasons, both for the child and for the parent. The following is a non-inclusive list: inheritance, social security benefits, stability in the child's life, access to custody and visitation, responsibility for child support. Without a court order, or legal relationship defined by statute, these parental rights and responsibilities are at risk, particularly if couples move from jurisdiction to jurisdiction, as family law is almost always state specific. For example, there are some states in which a marital presumption does not exist, or in which courts have refused to apply the marital presumption to married lesbian couples. *See*, e.g. *Matter of Q.M. v. B.C., 46 Misc.3d 594* (Family Ct. of Monroe County, New York, 2014).

Because the parental rights of lesbian married couples may not be upheld in all jurisdictions, and the marital presumption has not yet been applied to gay male married couples, we strongly recommend that such couples obtain a "second-parent" adoption. Such adoptions are not provided for in the Maryland Code nor have they been confirmed by a Maryland appellate court, but they have been granted in Maryland on a regular basis since 1994 in almost all counties, even if the couple is not married. Moreover, the U.S. Supreme Court, in *V.L. v. E.L.*, 136 S. Ct. 1017 (2016) found that a Georgia second-parent adoption was entitled to full faith and credit from the State of Alabama, despite Alabama's Supreme Court holding that said adoption was void for lack of subject matter jurisdiction in Georgia, thus depriving the Georgia court order of full faith and credit protections. See *Ex Parte E.L.*, 208 So. 3d 1102 (Ala. 2015). Accordingly, any second-parent adoption granted in a U.S. jurisdiction is entitled to full faith and credit in every other U.S. jurisdiction, insuring the parental rights of the non-birth parent notwithstanding the laws of another jurisdiction.

To be clear, we do not believe a second-parent adoption is necessary in Maryland where the marital presumption should be applied to a married lesbian couple, but such an adoption should protect a non-birth parent in any circumstance. We also believe that a married gay male couple has the same right to the marital presumption if their child is born from a gestational surrogacy using one of the men's sperm. The legal argument for application of the marital presumption in such circumstances is essentially the same as with a married lesbian couple.

If a lesbian or gay male couple is not married, have not obtained a second-parent adoption, but raise children together, proving a parental relationship between the legal parent and the children becomes much more difficult in the face of the legal parent's opposition. The Maryland Court of Appeals in *Conover, supra*, recently articulated the circumstances in which a non-biological, non-legal parent could be found to be a *de facto* parent. Such a finding would make the *de facto* parent essentially a legal parent. The factors for *de facto* parentage are:

1. *that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child;*
2. *that the petitioner and the child lived together in the same household;*
3. *that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and*
4. *that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.*

Contrary to the beliefs of many, a birth certificate does not establish a legal relationship between the parents named on the birth certificate and the child for whom the birth certificate has been issued. The birth certificate is simply a tool for the government to track births. The birth certificate may be used as evidence of legal parentage, but it is not dispositive. A recent U.S. Supreme Court case, *Pavan v. Smith*, 137 S. Ct. 2075 (2017) held that a married lesbian couple is entitled to both be named on the birth certificate of a child born into their marriage. Unfortunately, many married couples assume that their marriage and the birth certificate create a legal relationship between the non-birth parent and the child. This is incorrect, and a dangerous assumption on the part of the parents and their attorneys.

Family law, and in particular, parentage, is constantly changing to meet the needs of differently configured families, both by statute and case law. Maryland practitioners, even if they have been practicing family law for many years, need to be aware of the complicated interplay of various statutes and case law from the Maryland courts and other jurisdictions. Parentage is no longer a simple equation of married biological mother and biological father equal sole legal parents. Proving parentage requires a knowledge of statutes, case law and the realities of how courts on the ground are interpreting the law in this area which is, like the reproductive relationships in our society, in constant flux.