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The views expressed in this article belong to Susan L. Pollet and do not reflect the views of the New York State Unified Court System.



# Breaking Up Is Hard[er] to Do

## Same-Sex Divorce

By Susan L. Pollet

*"Gay divorce, it turns out, is as painful as the straight kind, and a lot more complicated."*

Jgoti Thottam

*"What is straight? A line can be straight, or a street, but the human heart, oh, no, it's curved like a road through mountains."*

Tennessee Williams, *A Streetcar Named Desire*, 1947

## Background

Some commentators maintain that marriage in our country, as in most societies throughout the world, is the “single most significant communal ceremony of belonging. It marks not just a joining of two people, but a joining of families and an occasion for tribal celebration and solidarity.”<sup>1</sup> Many legal commentators make the case for strengthening marriage in the 21st century by emphasizing the “emotional, financial, and social benefits flowing to children and communities from marriage.”<sup>2</sup> Others point out the decline of traditional marriage in contemporary society.<sup>3</sup> One commentator analyzed the economic double-edged sword with respect to same-sex couples who marry, and the disadvantages related to divorce, taxation and public assistance for certain individuals and couples.<sup>4</sup>

Whatever view of marriage one maintains, currently same-sex couples can be validly married in only a few jurisdictions – Massachusetts, Connecticut, Iowa, New Hampshire, Vermont and Washington, D.C.<sup>5</sup> One state has legalized civil unions, another four states have legalized domestic partnerships and, in addition to the five states which have successfully legalized same-sex marriage, three more states recognize out-of-state same-sex marriages (including New York).<sup>6</sup>

To complicate matters, in 1996, Congress passed the Defense of Marriage Act (DOMA), “defining ‘marriage’ as used in the United States Code to mean only a legal union between a man and a woman and ‘spouse’ to mean a husband or wife of the opposite sex. DOMA also explicitly permits each state to refuse to recognize same-sex marriages solemnized in other states.”<sup>7</sup> Forty states have now enacted “mini-DOMA” statutes, and 24 of those states have codified this policy in their constitutions.<sup>8</sup>

Gay male and lesbian couples typically raise children in three contexts. The first is where one of the partners is already the biological parent of a child. The second is where the same-sex couple agrees to have a child and plan that one of them will be the biological parent, and that, after birth, they will raise the child together. The third is where a same-sex couple seeks to adopt or become the foster parents of a child who is not biologically related to either of them.<sup>9</sup>

Approximately 250,000 children are being raised by same-sex couples in the United States, but the rights of these parents “vary widely among states,” in that only about half allow second-parent adoptions by the unmarried partner of an existing legal parent and a handful of state courts have ruled these adoptions not permissible under state laws.<sup>10</sup> Yet another estimate is that at least 270,000 children are being raised by same-sex couples; this number does not include single lesbian, gay, bisexual or transgender parents. It seems likely that same-sex parents are underreported in the Census.<sup>11</sup> (Another cited statistic is that between one million and nine million kids are raised in families with at least one gay parent.<sup>12</sup>) Same-sex couples are raising children via single-parent adoptions in all states except Florida.<sup>13</sup>

In today’s world there is the “potential for a child to have up to five ‘parents’ – the egg donor (the genetic mother), the sperm donor (the genetic father), the surrogate mother who hosts the pregnancy, and two ‘social’ or ‘psychological’ parents whom the child knows as ‘mother’ and ‘father.’”<sup>14</sup> The recent movie *The Kids Are All Right*, concerns two children conceived by artificial insemination. There are two lesbian mothers, whom the children refer to as the “Mommes,” each having carried one of the children, using the same sperm donor for both. That is a relatively uncomplicated example of the modern family. Competing claims of same-sex parents, and claims involving donor parents, can become extremely complex, however; this article will discuss claims of same-sex parents, only.

## Same-sex couples are discovering that getting divorced can be far more complicated than getting married.

What happens when same-sex couples seek to divorce? If they remain in the few states where same-sex couples can marry, then court matters should proceed as they would in cases involving heterosexual couples. However, if they move out of those states, they may very well be caught in a situation where they are unable to dissolve their legal bond. This is because of the limited recognition of these marriages, the residency requirements in the divorce statutes and the Supreme Court's "interpretation of the Full Faith and Credit Clause as extending only to those divorce decrees made with subject matter jurisdiction predicated on at least one party to the divorce being domiciled in the state."<sup>15</sup>

### Psychological Literature

First we will discuss some of the psychological literature as to the parenting of same-sex couples and how the children are faring in such households.

Very few studies involve same-sex relationships, marriage and divorce – as might be expected. There is one study, a three-year follow-up of same-sex couples who had civil unions in Vermont during the first year of that legislation (before Vermont adopted same-sex marriage).<sup>16</sup> Interestingly, civil union couples did not differ "on any measure" from same-sex couples who were not in civil unions.<sup>17</sup> The study did find, however, that "same-sex couples not in civil unions were more likely to have ended their relationships than same-sex civil union or heterosexual married couples. Compared with heterosexual married participants, both types of same-sex couples reported greater relationship quality, compatibility, and intimacy and lower levels of conflict."<sup>18</sup>

With regard to the parenting ability of same-sex couples, according to an article in an American Psychological Association (APA) publication, sexual orientation is not related to "parental effectiveness":<sup>19</sup>

Research indicates that lesbian mothers do not differ from heterosexual mothers on measures such as mental health, self-concept or behavior toward children. Children of same-sex parents do not differ from children of heterosexual parents on measures of personality or morality; nor do the groups differ in gender role/identity, developmental difficulties, sexual orientation, peer relationships or attitudes toward parents. Lesbian couples may actually be better than heterosexual couples in some ways, as research shows that lesbian couples are more knowledgeable about parenting skills. In sum, research indicates that there are few negative effects of being raised by same-sex parents.<sup>20</sup>

The governing body of the APA voted unanimously in favor of the following statement: "Research has shown

that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that children of lesbian and gay parents are as likely as those of heterosexual parents to flourish (APA, 2004)."<sup>21</sup> In addition, "the American Bar Association, the American Academy of Pediatrics, the American Psychiatric Association, and other mainstream professional groups have issued similar statements."<sup>22</sup>

Research results suggest that parental sexual orientation is less important than the quality of family relationships, such as the quality of daily interaction and the strength of the relationships children have with their same-sex parents.<sup>23</sup>

In a 25-year study recently reported in the *Journal of Pediatrics*, the findings suggested that "children raised in lesbian households were psychologically well-adjusted and had fewer behavioral problems than their peers."<sup>24</sup> (Some groups, however, have questioned the legitimacy of these findings because the study was funded by gay advocacy groups.<sup>25</sup>)

There is little empirical research on same-sex divorce and more research is needed on the dynamics of same-sex relationships and how they end.<sup>26</sup> It has been mentioned that psychologists could play an important role in shaping legal status by studying the "challenges that same-sex parents and their children face as they deal with post-break up relationships."<sup>27</sup> Further research is needed "regarding the potential strengths of children raised by same-sex parents, such as a greater appreciation of diversity and a willingness to challenge stereotypes."<sup>28</sup> In addition, more research is needed regarding "[t]he well-being and adjustment of children who do and do not have contact with a noncustodial parent after the breakup of the parental relationship" as the current research involves heterosexual families.<sup>29</sup> The argument has been made that "bias against gays and lesbians has been shown to have detrimental effects when it comes to the legal system (e.g., Anderson, 2004), so it is important for us to understand how homophobia and heterosexism might influence decision-making in same-sex divorce cases."<sup>30</sup>

### Legal Issues Arising Out of Same-Sex Divorce or Separation

Next we will analyze some of the legal issues involved in same-sex divorce, including the difficulty in getting a divorce, custody and visitation/access questions and adoption by same-sex couples.

#### Inability to Get a Divorce

The lesbian couple (Julie and Hillary Goodridge), who led the legal fight for Massachusetts to become the first state to legalize same-sex marriages in 2004, filed for divorce in that state five years later.<sup>31</sup> The irony of that occurrence has not been lost on the media. Clearly, the next same-sex

challenge is divorce, and all eyes are on Massachusetts to see how same-sex marriage and divorce will evolve. In 2008 it was reported that 10,000 gay and lesbian couples married after Massachusetts made same-sex marriage legal. Apparently dozens of such couples have divorced since then, although no records are kept.<sup>32</sup> According to "the most recent data from the National Center for Vital Statistics, Massachusetts retains the national title as the lowest divorce rate state, and the MA divorce rate is about where the US divorce rate was in 1940, prior to the Japanese bombing of Pearl Harbor that triggered the US entrance into World War Two."<sup>33</sup> (A UCLA study of same-sex couples "in states that offer civil unions or legal domestic partnerships showed that these couples broke their legal bonds at about the same rate as straight couples: 2 percent per year."<sup>34</sup>)

One expert in Connecticut has noted that the biggest issue with same-sex divorce is financial in that judges and attorneys have a "steep" learning curve to understand how federal nonrecognition (DOMA) impacts same-sex couples and can complicate state court orders.<sup>35</sup> More time is needed to fully assess how the courts in states that allow same-sex divorce will be deciding issues related to divorce, custody, visitation, access and adoption.

Massachusetts is an equitable-distribution state, and since a major factor in determining the distribution of assets is the duration of the marriage, arguments are

being made in court by gay spouses that they would have been married longer if it had been allowed.<sup>36</sup>

Researchers have noted that "[a]round the country, same-sex couples are discovering that getting divorced can be far more complicated than getting married," and sometimes these problems "stem from living in a state with different laws from the state where the marriage took place."<sup>37</sup> Because of DOMA, which bans federal recognition of same-sex marriage, gay couples may not be entitled to the same tax-free division of assets as their heterosexual counterparts as far as the federal taxes are concerned, even in states that recognize same-sex marriage.<sup>38</sup> While most states have passed statutes or constitutional amendments defining marriage as being between a man and a woman, the courts are making the ultimate ruling on whether that means that married same-sex couples should not be allowed to divorce.<sup>39</sup>

For gay couples living in a state that does not recognize same-sex marriage or does not allow same-sex divorce, it may not be worth getting married because you "may not be able to get divorced, you couldn't remarry, your status would always be in question, and you wouldn't get the benefits of marriage anyway."<sup>40</sup>

States that don't allow gay marriage "have been struggling with whether to grant divorces for marriages performed in states that do."<sup>41</sup> The two issues which come up are that each state has laws that require a minimum

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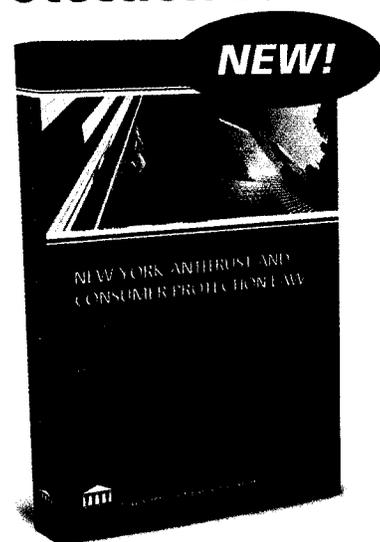
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duration of residency to obtain a divorce in that state, and that "in many 'non-recognition' states granting a divorce is seen as a form of 'recognition' of the legal relationship."<sup>42</sup> For example, courts in Rhode Island and judges in Oklahoma and Texas have refused to grant divorces, while courts in New Jersey and New York have allowed them.<sup>43</sup> The California Supreme Court ruled that same-sex marriages that took place in 2008 before voters approved a ban will remain valid and recognized, such that "all of the rules of marriage apply, including divorce."<sup>44</sup> A full summary of out-of-state recognition of same-sex divorces is in the chart included in this article.

Why is same-sex divorce important for same-sex couples? "[H]aving access to the structure of laws determines how you pull apart one of the most financially intertwined relationships and also gives you a neutral arbiter, a judge, to help navigate"; from a psychological standpoint it "helps to create a ritual of separation, a ritual for disengagement."<sup>45</sup> One psychologist opined that preventing same-sex couples from marrying in states but allowing them to divorce is "an incredibly negative destabilizing message" that "somehow you don't have equal rights," creating the inadvertent message that "[w]e'll help you to separate; we just won't help you to get together."<sup>46</sup>

Since there are so many legal intricacies with same-sex marriage and divorce, the problem is "that in cases where the partners disagree over 'parentage, money or property,' one person may be able to 'take advantage of the situation' and use the legal confusion to deprive the other person of rights they would have if the partners were not the same sex."<sup>47</sup> From a practical standpoint, while the state a same-sex couple lives in may not recognize the marriage, either spouse may relocate to a state that does recognize the marriage, and then some marital obligations (like joint liability debt) could attach, and it would be bigamous to marry someone else.<sup>48</sup> This legal limbo is unacceptable to many.<sup>49</sup>

Some experts have recommended the following steps: (1) same-sex couples should sign prenuptial agreements or domestic-partner agreements to outline how assets should be divided in a split even if it cannot be enforced; (2) the non-biological parent should adopt the children or move to a state where that parent can; (3) all legal unions should be dissolved through the legal system whenever possible; and (4) same-sex couples should work with tax specialists on dividing assets, dealing with retirement assets, and working through the tax implications of alimony.<sup>50</sup> Co-parenting agreements which recognize the "parental roles, affections, and responsibilities that develop between the child and the nonbiological" parent can be utilized.<sup>51</sup> One commentator noted that the National Center for Lesbian Rights "recognizes that the co-parenting agreements may not be an enforceable legal document but may be useful to the nonbiological parent in establishing a parent-child relationship if that is dis-

puted in the future."<sup>52</sup> An excellent discussion of various legal considerations when advising same-sex couples is contained in an article titled "Considerations, Pitfalls, and Opportunities That Arise When Advising Same-Sex Couples," by Raymond Prather.<sup>53</sup>

### Custody and Access

When married heterosexuals who have children divorce, the parents are "automatically presumed to be the legal parents of their children" and absent a "termination due to unfitness, they retain their rights upon divorce."<sup>54</sup> With gay, lesbian, bisexual, and transgendered (GLBT) parents, the "rights are less clear."<sup>55</sup> Only the biological parent of the child in the gay relationship is "presumed to be the legal parent," and the nonbiological parent typically "has to overcome the presumption in favor of the biological parent."<sup>56</sup> In states where gay marriage and civil unions are illegal, "the rights of non-legal parents are tenuous at best and depend on the willingness of judges to find *de facto* parenthood."<sup>57</sup>

According to the literature,

state custody and visitation determinations concerning homosexual, biological parents typically fall into three categories of rules: (1) *per se*, in which homosexuality in and of itself is considered harmful to the child; (2) burden shifting, which places the burden on the homosexual parent to show that there is no adverse impact; and (3) nexus, which creates a presumption that custody or visitation for the homosexual parent is proper, rebuttable by evidence of harm stemming from the parent's homosexual relationships.<sup>58</sup>

One commentator stated that "an increasing number of courts have recognized the custodial and visitation rights of gay and lesbian *de facto* parents, noting that family relationships do not always mimic biological ones," and the increasing recognition of same-sex marriage and civil unions "support this trend."<sup>59</sup> Another noted that when a noncustodial parent is homosexual, "states are divided as to how much weight should be accorded to this factor in determining the visitation suitable to the best interest of the child" and that while most states do not consider the parent's homosexuality, "a few still consider homosexuality in and of itself to be harmful to the child."<sup>60</sup>

An interesting psychological issue which impacts legal proceedings arises in the context of assessing the custodial preferences of children of gay and lesbian parents in custody cases. This litigation generally arises in two ways: the first situation is "either prior to or upon divorce, one parent discloses his or her same sex orientation to the other parent."<sup>61</sup> In the second, "a parent discloses same sex orientation after the divorce and initial custody determination have been made," and the parent who lost custody tries to challenge the award upon discovery that the custodial parent is gay or lesbian.<sup>62</sup> One commentator argues that in cases where children

expressed a preference not to live with the gay or lesbian parent, the bases of their preferences “seem too entangled with their emotional reaction to their parent’s disclosure of a same sex orientation and accompanying lifestyle, rather than on the parent’s care-giving abilities.”<sup>63</sup>

Apparently, there is a dearth of literature about a child’s perception of a gay or lesbian parent’s homosexuality. However, according to one commentator,

the existing literature on child development and gay and lesbian parenting does indicate a general pattern of responses to a parent’s disclosure of a lesbian or gay orientation. Although many children and adolescents initially experience negative emotions stemming from internalized homophobia upon disclosure, many emerge supportive of, well adjusted to, and comfortable with their parent’s same sex orientation once they process their feelings and concerns. A child’s perception of her gay or lesbian parent will likely evolve with age, development, and sophistication, as well as with the child’s developing relationship with the parent.<sup>64</sup>

The commentator suggests that courts must be informed about the responses children have in these situations, and that the court should either delay the timing of ascertaining the children’s preferences until the children have had time to process it or should not take the children’s preferences into consideration when making its ultimate decision if delay is not an option.<sup>65</sup>

At the current time, all 50 states “have rejected a gender-based presumption in child custody and visitation disputes in favor of a gender-neutral, best-interest-of-the-child analysis,” which leaves broad discretion with the judges.<sup>66</sup> A commentator noted that “[h]istorically, many courts have determined that homosexuality and parenting are irreconcilable, which results in the gay parent losing custody.”<sup>67</sup>

Some of the “popular” arguments that courts have used include “concern for social stigma, gender role or sexual orientation confusion, and improper socialization of the children involved.”<sup>68</sup> Another commentator asserts that “[a] judicial ruling that gives custody to a heterosexual parent over a lesbian or gay parent solely on the grounds of sexual orientation ignores the purpose of the best interests of the child standard,”<sup>69</sup> arguing that “[c]ourts applying the best interests standard should focus on the child’s general necessities and not on the parent’s identity as lesbian, gay, or heterosexual. Further, judges should disregard their own personal morals, prejudices, or political beliefs.”<sup>70</sup> It should be noted that trends indicate that courts are focusing more on the welfare of the child and placing less emphasis on sexual orientation, but there is still concern about this issue in many states.<sup>71</sup>

According to one expert, some family court judges do not appreciate intervention from civil rights organizations in the context of custody cases as they do not want it to be a political issue but rather a discussion about what is in the child’s best interests.<sup>72</sup>

Gay men have faced a stereotype that they are “hypersexual, self-absorbed, untrustworthy in their intimate relationships, and unwilling or unable to commit to a long-term intimate relationship.”<sup>73</sup> One commentator noted that because gay fathers of heterosexual marriages “came out” in the context of divorce litigation, it reinforced this negative gay identity.<sup>74</sup> However, now that there is a new generation of gay fathers who began parenting while in an openly gay relationship, and who have been involved in securing legal recognition for their families through same-sex marriage, civil union and second-parent adoptions, it is argued that the gay identity will change and the society will be able to accept the possibility of “fatherhood within a committed gay relationship.”<sup>75</sup>

Using mediation would allow gay couples to maintain control of their dispute rather than subject themselves to the biases of the legal system.

Jurisdictions with same-sex marriages “would benefit from the creation of mediation programs to administer child custody arrangements upon same-sex divorce,”<sup>76</sup> in part because they address the specific needs of these families, would ease the “stress of changing current standards of child custody,” and would avoid burdening “an already backlogged family court system.”<sup>77</sup> One commentator observed that using mediation to resolve custody and visitation conflicts would allow “gay couples [to] maintain control of their dispute rather than subject themselves to the biases of the legal system.”<sup>78</sup> Other reasons are that mediation encourages privacy, preserves the dignity of gay parents, and empowers gay and lesbian couples.<sup>79</sup> The most “pressing concerns” for the use of mediation are the questions of consent and enforceability.<sup>80</sup>

Another issue, which is outside the scope of this article, is cases where there is domestic violence, which may impact upon custody and visitation cases. One commentator maintained that incidents of violence occur as frequently with same-sex couples as with heterosexual couples.<sup>81</sup> Same-gender victims often have the additional stress of severe isolation and the fear that the abuser will “out them” in a hostile manner.<sup>82</sup> More research needs to be done regarding domestic violence issues, and divorce professionals need to have special training to work with these couples.<sup>83</sup>

### Adoption

Adoption was “unknown at common law and therefore in the United States it required statutory authorization. The first adoption statute was not enacted until 1851,

in Massachusetts.<sup>84</sup> "The question in the twenty-first century is not whether to recognize legal parentage in the absence of biology but when to do so."<sup>85</sup>

A new family form developed starting in the late 1970s, which was when "lesbians and gay men [began] giving birth to and adopting children [in] the context of same-gender relationships, using advances in reproductive technology and changes in adoption options to accomplish these aims (Pies, 1989)."<sup>86</sup> This has been referred to in the lesbian, gay, and bisexual community as the "gay-by boom."<sup>87</sup>

Because of the growing need for adoptive homes and the growing numbers of same-sex parent families who want to adopt, there has been a "dramatic decrease in anti-gay discrimination on the part of adoption agencies and courts."<sup>88</sup> With respect to individual adoptions, every state permits unmarried individuals to adopt; however, Florida, by statute, "categorically" prohibits lesbians and gay individuals from becoming adoptive parents.<sup>89</sup> In general, the best interests of the child is the standard used for approving a same-sex adoption, but, as one commentator notes, judicial reaction can range from "supportive acceptance to overt hostility."<sup>90</sup> (In New York, administrative regulations "prohibit the denial of an adoption solely on the basis of the applicant's marital status or sexual orientation."<sup>91</sup>)

In addition to individual adoptions, there are second-parent adoptions and joint adoptions. Second-parent adoptions allow a same-sex partner to adopt her or his partner's biological or adoptive child without terminating the first legal parent's rights; joint adoptions permit both partners to simultaneously adopt a child.<sup>92</sup>

A challenge faced by children of lesbian and gay families is that of equal legal access to the parents who raised them, because the biological parent is the only legal parent, even if the same-gender partner is the primary care giver from birth onward.<sup>93</sup> There is research demonstrating that children form strong bonds with the non-biological, non-adoptive parent, and thus, it is argued, a continued relationship is in the best interests of children.<sup>94</sup> However, depending on the state statute, many states do not allow for second-parent adoption.<sup>95</sup>

One of the first "second-parent" adoptions was in Alaska, and it was actually a third-parent adoption, in which the judge granted an adoption to the mother's partner without terminating the parental rights of the child's biological father.<sup>96</sup>

A number of scholars have made the argument that adoptions by same-sex couples are entitled to "exact-ing full faith and credit as a matter of constitutional law and, therefore, must be respected and enforced by other states even if they violate the public policy of the second state."<sup>97</sup> (One commentator has added that other types of parentage adjudications, including those "made in the

context of otherwise modifiable orders like child custody and support orders," are likewise entitled to full faith and credit.<sup>98</sup>)

In a 2002 policy statement, the American Academy of Pediatrics asserted, in part, that "[c]hildren who are born to or adopted by one member of a same-sex couple deserve the security of two legally recognized parents."<sup>99</sup> With respect to lesbians, one commentator raises the poignant question: Why should a mother have to adopt her own child?<sup>100</sup>

Second-parent adoptions give children of same-sex parents legal security. They become entitled to financial benefits, including inheritance rights, wrongful death and other tort damages, Social Security benefits, child support and health insurance coverage.<sup>101</sup> In addition, second-parent adoptions protect the rights of the same-sex parent who is the nonbiological parent in that the relationship will be legally recognized if the couple separates or if the biological or original adoptive parent dies, becomes incapacitated or is incarcerated.<sup>102</sup>

States that recognize same-sex marriage, or provide for comprehensive domestic partnerships or civil unions, allow couples to use the stepparent adoption procedures that married couples may use.<sup>103</sup> Domestic partner and civil union adoptions have the same effect as a second-parent adoption, "but they are often faster and less expensive than second parent adoptions."<sup>104</sup>

In those states where second-parent adoptions are not recognized, it is recommended that same-sex couples prepare backup documentation to help ensure that the parent-child relationship will be legally recognized because the question of whether other states must recognize adoptions by same-sex couples is still unsettled.<sup>105</sup> These documents would include a shared or co-parenting agreement and a nomination of guardian and powers of attorney.<sup>106</sup>

### Narrative Summary

Included in this article, starting on page 19, is a chart showing current legislation in all 50 states with regard to these legal issues. This information is constantly changing, so periodically check the information on the Lambda Legal website, the Human Rights Campaign website and other like websites.<sup>107</sup> The chart indicates, as noted earlier, that only five states have legalized same-sex marriage plus the District of Columbia. Only one has legalized civil unions and another four have legalized domestic partnerships. In addition to the five states that permit same-sex marriage, three more recognize out-of-state same-sex marriages. With respect to adoption, only one state, Florida, does not permit a single LGBT person to adopt. Second-parent adoption has been recognized in 28 states, and joint adoption has been recognized in 16 states.

## Conclusion

Because of the state and federal legal patchwork of laws with regard to same-sex couples marrying, adopting children, and then divorcing, legal advice by lawyers knowledgeable and up-to-date in the field is essential. The current research indicates that the emotional and personal issues in gay divorce are similar to straight divorce; however, the legal and tax issues make same-sex divorce that much more complicated. Some believe that mediation is a better route for divorcing same-sex couples rather than going to court; others opine that this must be considered on a case-by-case basis.

Same-sex couples have become more numerous and visible, and there appears to be a trend toward integrating these families into the current framework of family law protections. The lack of uniformity on the state and federal levels makes this area of the law a great challenge, one which will not be resolved quickly or easily. ■

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40. Bernard, *supra* note 38.
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44. Mackey, *supra* note 34.
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57. Larson, *supra* note 54.
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65. *Id.* at 703.
66. Larson, *supra* note 54.

## Chart of Current Legislation Regarding Same-Sex Couples

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72. Kimberly D. Richman, *(When) Are Rights Wrong? Rights Discourses and Indeterminacy in Gay and Lesbian Parents' Custody Cases*, 30 *Law & Soc. Inquiry* 137, 165 (Winter 2005).
73. E. Gary Spitko, *Sexual Orientation: Public Perceptions: From Queer to Paternity: How Primary Gay Fathers are Changing Fatherhood and Gay Identity*, 24 *St. Louis U. Publ. L. Rev.* 195, 207 (2005).
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78. William Mason Emmett, *Note: Queer Conflicts: Mediating Parenting Disputes Within the Gay Community*, 86 *Geo. L. J.* 433, 449 (Nov. 1997).
79. *Id.* at 449.
80. *Id.*
81. Joanna Bunker Rohrbaugh, *Domestic Violence in Same-Gender Relationships*, 44 *Fam. Ct. Rev.* 287, 296 (Apr. 2006).
82. *Id.* at 297.
83. *Id.*
84. Nancy D. Polikoff, *Symposium on Gender, Parenting, And the Law: Article: A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-first Century*, 5 *Stan. J.C.R. & C.L.* 201, 214 (October 2009).
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86. Laura S. Brown, *Special Issue: Troxel v. Granville and Its Implications for Families and Practice: A Multidisciplinary Symposium: "Relationships More Enduring": Implications of the Troxel Decision for Lesbian and Gay Families*, 41 *Fam. Ct. Rev.* 60 (Jan. 2003).
87. *Id.*
88. National Center for Lesbian Rights, *Adoption by Lesbian, Gay, and Bisexual Parents: An Overview of Current Law*, [www.nclrights.org](http://www.nclrights.org) (2010).
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. Brown, *supra* note 86 at 61.
94. D'Arcy L. Reinhard, *As Iowa Goes, So Goes the Nation: Varnum v. Brien and Its Impact on Marriage Rights for Same-Sex Couples: Student Note: Recognition of Non-Biological, Non-Adoptive Parents in Arkansas, Florida, Mississippi, and Utah: A De Facto Parent Doctrine to Protect the Best Interests of the Child*, 13 *J. Gender Race & Just.* 441 (Winter 2010).
95. See Rebecca Mae Salokar, *Gay and Lesbian Parenting in Florida: Family Creation Around the Law*, 4 *FIU L. Rev.* 473 (Spring, 2009), for a discussion of how same-sex couples have built their families despite the ban on adoptions by "homosexuals."
96. Polikoff, *supra* note 84 at 243.
97. Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 *Ohio St. L. J.* 563, 566 (2009).
98. *Id.*
99. Brown, *supra* note 86 at 65.
100. Polikoff, *supra* note 84 at 267.
101. National Center for Lesbian Rights, *supra* at 88.
102. *Id.*
103. *Id.*
104. *Id.*
105. Anthony C. Infanti, *Surveying the Legal Landscape for Pennsylvania Same-Sex Couples*, 71 *U. Pitt. L. Rev.* 187, 206 (Winter 2009).
106. *Id.*; see also additional private documents at <http://www.nclrights.org/lifelines>.
107. See [lambdalegal.org](http://lambdalegal.org); [www.hrc.org/statelaws](http://www.hrc.org/statelaws); [www.familyequality.org](http://www.familyequality.org); [www.nclrights.org](http://www.nclrights.org). For information particular to New York, see [www.pride-agenda.org](http://www.pride-agenda.org).

The chart, starting on the right, summarizes current legislation, as of May 2010, in all 50 states regarding same-sex couples. Specifically, it addresses: (1) whether the state has same sex marriage, (2) whether the state has civil unions, (3) whether the state has domestic partnerships, (4) whether the state recognizes out of state marriages, (5) whether a single Lesbian, Gay, Bisexual, or Transvestite (LGBT) person can adopt on his or her own, (6) whether the state recognizes second parent adoption,† (7) whether the state recognizes joint adoption.††

Out of 50 states, five have successfully legalized same sex marriage (not including the District of Columbia).\*

Only one state has legalized civil unions.\* \*

Another four states have legalized domestic partnerships.\*\*\*

In addition to the five states that have same-sex marriage, three more recognize out-of-state same-sex marriages.\*\*\*\*

Only Florida does not allow a single LGBT person to adopt. Second parent adoption has been recognized in 28 states, either statutorily or through successful petitioning in the courts.‡

Joint adoption has been recognized in 16 states, either statutorily or through successful petitioning in the courts.‡‡

†Second Parent Adoption is defined by the National Center for Lesbian Rights as follows: "Second parent adoption (also called co-parent adoption) is a legal procedure that allows a same sex partner to adopt her or his partner's biological or adoptive child without terminating the first legal parent's rights." National Center for Lesbian Rights, *Adoption by LGBT Parents*, [www.nclrights.org](http://www.nclrights.org) (2010).

††Joint Adoption allows both partners to simultaneously adopt a child. National Center for Lesbian Rights, *Adoption by Lesbian, Gay, and Bisexual Parents: An Overview of Current Law*, [www.nclrights.org](http://www.nclrights.org) (2010).

\*Connecticut, Iowa, Massachusetts, New Hampshire, Vermont

\*\*New Jersey

\*\*\*California, Nevada, Oregon, Washington

\*\*\*\*Connecticut, Iowa, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Vermont

‡Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Washington, Wisconsin

‡‡ California, Colorado, Connecticut, Illinois, Indiana, Iowa, Maine, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Vermont, Washington, Wisconsin

State	Marriage	Civil Union	Domestic P'ship	Reciprocal Beneficiaries	Statute	Out of State Recognition	Gay/Lesbian Adoption*	Second Parent Adoption**	Joint Adoption***
Alabama	No	No	No		Code of Ala. § 30-1-19	No	Yes	same sex couples have successfully petitioned	not specifically addressed by statute
Alaska	No	No	No	Yes (limited domestic p'ship benefits to state employees)	Alaska Stat. § 25.05.013	No	Yes	same sex couples have successfully petitioned	not specifically addressed by statute
Arizona	No	No	No		A.R.S. § 25-101	No	Yes	not specifically addressed by statute	not specifically addressed by statute
Arkansas	No	No	No		A.C.A. § 9-11-208	No	Yes	Yes	No
California	No	No	Yes?		Cal. Fam. Code § 297 (court case pending re: constitutionality of denial of same sex marriage)	Yes	Yes	Yes	Yes
Colorado	No	No	No	Yes	C.R.S. 14-2-104	No	Yes	Yes	Yes
Connecticut	Yes	No	No		Conn. Gen. Stat. § 1-1m	Yes	Yes	Yes	Yes
Delaware	No	No	No		13 Del. C. § 101	No	Yes	same sex couples have successfully petitioned	not specifically addressed by statute
Florida	No	No	No		Fla. Stat. § 741.212	No	No	No	No
Georgia	No	No	No		O.C.G.A. § 19-3-3.1	No	Yes	not specifically addressed by statute	not specifically addressed by statute
Hawaii	No	No	No	Yes	HRS § 572-1	No	Yes	same sex couples have successfully petitioned	not specifically addressed by statute
Idaho	No	No	No		Idaho Code § 32-209	No	Yes	not specifically addressed by statute	not specifically addressed by statute
Illinois	No	No	No	Yes (limited domestic p'ship benefits)	750 ILCS 5/213-1	No	Yes	same sex couples have successfully petitioned	Yes
Indiana	No	No	No		Burns Ind. Code Ann. § 31-11-1-1	No	Yes	not specifically addressed by statute	Yes
Iowa	Yes	No	No		Iowa Code § 595.2	Yes	Yes	same sex couples have successfully petitioned	Yes
Kansas	No	No	No		K.S.A. § 23-101	No	Yes	not specifically addressed by statute	not specifically addressed by statute
Kentucky	No	No	No		KRS § 402.005	No	Yes	not specifically addressed by statute	not specifically addressed by statute
Louisiana	No	No	No		La. C.C. Art. 86/La. C.C. Art. 89	No	Yes	same sex couples have successfully petitioned	not specifically addressed by statute
Maine	No	No	No	Yes (limited domestic p'ship benefits to state employees)	19-A M.R.S. § 701	No	Yes	not specifically addressed by statute	Yes
Maryland	No	No	No		Md. Family Law Code Ann. § 2-201	perhaps	Yes	same sex couples have successfully petitioned	not specifically addressed by statute
Massachusetts	Yes	No	No		440 Mass. 309; 798 N.E.2d 941; 2003 Mass. LEXIS 814	Yes	Yes	Yes	Yes
Michigan	No	No	No		MCL § 551.272	No	Yes	not specifically addressed by statute	No
Minnesota	No	No	No		Minn. Stat. § 517.01	No	Yes	same sex couples have successfully petitioned	not specifically addressed by statute
Mississippi	No	No	No		Miss. Code Ann. § 93-1-1	No	Yes	No	No
Missouri	No	No	No		§ 451.022 R.S.Mo.	No	Yes	not specifically addressed by statute	not specifically addressed by statute
Montana	No	No	No	Yes (limited domestic p'ship benefits to state employees)	Mont. Code Anno., § 40-1-401	No	Yes	not specifically addressed by statute	not specifically addressed by statute

**Current Legislation Regarding Same-Sex Couples (continued)**

Nebraska	No	No	No	No	Ne. Const. Art. I, § 29	No	R.R.S. Neb. § 42-341	Yes	not specifically addressed by statute
Nevada	No	No	Yes	No	Nev. Rev. Stat. Ann. § 122A.040	no statutory language	no statutory language	Yes	same sex couples have successfully petitioned to adopt in some jurisdictions
New Hampshire	Yes	No	No	No	RSA 457:1-a / RSA 457:46	Yes	RSA 457:3 / RSA 457:45	Yes	same sex couples have successfully petitioned to adopt in some jurisdictions
New Jersey	No	Yes	No	No	N.J. Stat. § 37:1-28	Yes (for civil unions)	N.J. Stat. § 37:1-34	Yes	Yes
New Mexico	No	No	No	Yes (limited domestic partnership benefits to state employees)	N.M. Stat. Ann. § 28-1-7	Yes	N.M. Stat. Ann. § 40-1-4	Yes	not specifically addressed by statute
New York	No	No	No	No	no statutory language	Yes	case law	Yes	Yes
North Carolina	No	No	No	No	N.C. Gen. Stat. § 51-1.2	No	N.C. Gen. Stat. § 51-1.2	Yes	No
North Dakota	No	No	No	No	N.D. Cent. Code, § 14-03-01	No	N.D. Cent. Code, § 14-03-08	Yes	not specifically addressed by statute
Ohio	No	No	No	No	ORC Ann. 3101.01	No	ORC Ann. 3101.01	Yes	not specifically addressed by statute
Oklahoma	No	No	No	No	43 Okl. St. § 3	No	43 Okl. St. § 3.1	Yes	not specifically addressed by statute
Oregon	No	No	Yes	No	ORS § 106.310	no statutory language	no statutory language	Yes	Yes
Pennsylvania	No	No	No	No	23 Pa. C.S. § 1102	No	23 Pa. C.S. § 1704	Yes	not specifically addressed by statute
Rhode Island	No	No	No	Yes (limited domestic partnership benefits to state employees)	R.I. Gen. Laws §§ 28-5-5, 28-5-7, 28-5-5 and 28-5-7	no statutory language	no statutory language	Yes	not specifically addressed by statute
South Carolina	No	No	No	No	S.C. Code Ann. § 20-1-10 / S.C. Code Ann. § 20-1-15	No	no statutory language	Yes	not specifically addressed by statute
South Dakota	No	No	No	No	S.D. Codified Laws § 25-1-1	No	S.D. Codified Laws § 25-1-38	Yes	not specifically addressed by statute
Tennessee	No	No	No	No	Tenn. Code Ann. § 36-3-113	No	Tenn. Code Ann. § 36-3-113	Yes	not specifically addressed by statute
Texas	No	No	No	No	Tex. Const. Art. I, § 32 / Tex. Fam. Code § 6.204	No	Tex. Fam. Code § 6.204	Yes	not specifically addressed by statute
Utah	No	No	No	No	Utah Const. Art. I, § 29 / Utah Code Ann. § 30-1-4.1	No	no statutory language	Yes	No
Vermont	Yes	No	No	No	15 V.S.A. § 8	Yes	15 V.S.A. § 8	Yes	Yes
Virginia	No	No	No	No	Va. Code Ann. § 20-45.2 / Va. Code Ann. § 20-45.3	No	Va. Code Ann. § 20-45.2 / Va. Code Ann. § 20-45.3	Yes	not specifically addressed by statute
Washington	No	No	Yes	No	Rev. Code Wash. (ARCW) § 26.04.010 / Rev. Code Wash. (ARCW) § 26.04.020 / Rev. Code Wash. (ARCW) § 26.60.030	No	Rev. Code Wash. (ARCW) § 26.04.020	Yes	same sex couples have successfully petitioned
West Virginia	No	No	No	No	W. Va. Code § 48-2-603	No	W. Va. Code § 48-2-603	Yes	not specifically addressed by statute
Wisconsin	No	No	No	Yes (limited domestic partnership benefits to state employees)	Wis. Const. Art. XIII, § 13 / Wis. Stat. § 765.01 / Wis. Stat. § 770.05 (D.P)	No	Wis. Stat. § 765.04 / Wis. Stat. § 765.30	Yes	Yes
Wyoming	No	No	No	No	Wyo. Stat. § 20-1-101	No	no statutory language	Yes	not specifically addressed by statute

Information valid as of 5/18/10. Information obtained from Lambda Legal <http://www.lambdalegal.org/>, Human Rights Campaign <http://www.hrc.org/>, Individual State Statutes, and Independent Research by Law Students