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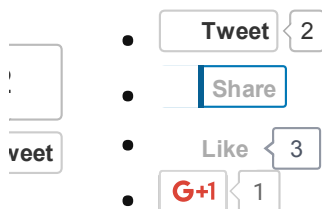
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# Verdict

SEPTEMBER 15, 2015

JOANNA L. GROSSMAN

## When One Door Opens, Another Closes: Parentage Law After *Obergefell v. Hodges*



There is no question that the Supreme Court's June 2015 ruling in ***Obergefell v. Hodges***



(<https://supreme.justia.com/cases/federal/us/576/14-556/>), in which it declared a constitutional right to marry a person of the same sex, changed the legal landscape dramatically. The patchwork of laws either embracing or prohibiting such marriages had become increasingly hard to reconcile as couples moved or traveled from one state to the next and faced uncertainty about their marital status.

With a single wave of its constitutional wand, the Supreme Court ended those conflicts. Same-sex married couples can marry anywhere—and, importantly, divorce anywhere. And wherever they go, they are just as married as any other married couple. But what about the status of children of same-sex couples? *Obergefell* resolved some thorny parentage law issues, but left untouched or even created others. In this column, I will begin to sort through those issues—what has been resolved, what is likely to be resolved in the near future, and what is likely to linger unresolved.

The bottom line is that, at least initially, *Obergefell* has opened up new paths to parentage for same-sex couples, but perhaps narrowed or closed off others that were created as workarounds in a restrictive marriage regime. Just as Alexander Graham Bell cautioned against looking so long and regretfully at the closed door, at the expense of the newly opened one, we should avoid the converse.

### ***Obergefell v. Hodges*: A Recap**

In two simple sentences, the Supreme Court in *Obergefell* ended a decades-long controversy over the right of same-sex couples to marry.

“The Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex. . . . [T]he Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”

The simplicity of these statements belies the complexity of the national landscape at that time. States were stridently split between allowing same-sex couples to marry, on the one hand, and prohibiting both the celebration and recognition of marriages by same-sex couples, on the other.

There were three clear consequences of this ruling: (1) same-sex couples can marry in any American state (notwithstanding futile efforts of some clerks and jurisdictions to block licenses from issuing); (2) same-sex couples who do marry will be recognized as married both horizontally—by other states—and vertically—by the federal government; and (3) same-sex married couples can divorce or seek annulments on the same terms as any other married couple. (A detailed analysis of the ruling and the history that led to it is available [here \(https://verdict.justia.com/2015/06/26/from-zero-to-fifty-in-eleven-years\)](https://verdict.justia.com/2015/06/26/from-zero-to-fifty-in-eleven-years).)

Less clear are the consequences for parentage law. How does the right to marry affect the creation of parent-child relationships in families anchored by a same-sex couple? The answer will vary by context, the particular way in which a same-sex couple became parents.

### **Parentage Rules in Heterosexual-Couple Families**

For heterosexual couples, marriage affects parentage. Let’s consider an old-fashioned example: a child conceived through heterosexual sex. If a married woman gives birth to a child, her husband is presumed (under a rule generally referred to as the “marital presumption”) to be the biological father and, thus, has legal rights and obligations unless

paternity is disproved within an often-restrictive set of procedural rules. If that married woman's baby has a different biological father, his ability to be recognized (either for his sake, to obtain custody or visitation rights, or for hers, to obtain child support) will depend on whether her husband is deemed the legal father or not. The child, in **every state but California (<https://verdict.justia.com/2013/10/15/california-allows-children-two-legal-parents>)**, is limited to two legal parents.

If an unmarried woman gives birth to a child, the biological father can be deemed the legal father for support purposes upon proof of his paternity. If the mother does not seek paternity or support, the unwed father may or may not have rights, depending on whether he has satisfied statutory criteria such as an acknowledgment or adjudication of paternity, registry as a putative father, or openly holding out the child as his own. And if he hasn't satisfied any of the enumerated criteria, his rights will turn on his ability to prove that the statutory scheme unconstitutionally infringed on his parental rights (a recent and unsuccessful effort to do so is explained **here** (<https://verdict.justia.com/2015/09/02/he-who-hesitated-lost-unwed-father-in-utah-forfeits-parental-rights>)).

Married heterosexual couples also become parents in other ways—through adoption, surrogacy, and gamete donation. The rules in those situations are explained below, as I discuss the impact of *Obergefell* in each situation.

## **Parentage Rules in Same-Sex-Couple Families**

Same-sex couples, obviously, cannot produce a child that is genetically related to both of them—and only them. Thus, questions of parentage are, right off the bat, more complicated for these families. But does the ability to marry (and be treated as married nationwide) resolve some of those complications? There is no uniform answer to that question; it varies by method of conception and a variety of other factors.

**Surrogacy.** An increasingly popular type of family creation, surrogacy involves an agreement that one woman will conceive and carry a child that someone else will raise. Most modern surrogacy arrangements involve gestational surrogacy, in which the carrier provides only the womb, not the egg. The egg and sperm will come either from the intended parents, from donors, or a combination of the two. Surrogacy remains controversial for both same-sex and different-sex families, and states remain split over its legality. (Examples of recent controversies can be found **here** (<https://verdict.justia.com/2012/01/10/the-complications-of-surrogacy>), **here** (<https://verdict.justia.com/2013/08/06/a-matter-of-contract-the-wisconsin-supreme-court-rules-traditional-surrogacy-agreements-are-enforceable>), **here** (<https://verdict.justia.com/2014/04/29/adoption-gay-couple-blocked-illegal>).

**surrogacy-agreement**) and **here (<https://verdict.justia.com/2014/10/14/traditional-surrogacy-tennessee-strange-statute-begets-strange-judicial-ruling>)**.) There are still many states, including New York, that prohibit paid surrogacy, and others that have no clear rule.

An increasing number of states, however, regulate surrogacy by statute. In those states, gestational surrogacy is permitted, but only within certain parameters. And in at least four of those states (Florida, Utah, Virginia and Texas), only a married couple can enter into an agreement with a gestational carrier to produce a child. In those states, none of which voluntarily permitted same-sex couples to marry prior to *Obergefell* (some were subject to federal court orders invalidating their state bans on constitutional grounds), same-sex couples and different-sex couples are now on equal footing—if they want to become parents via surrogacy, they must marry first, but at least they *can* marry.

**Adoption.** Adoption can raise many legal issues, but let's just focus on two situations most likely to affect a same-sex couple. First, when two people wish to jointly adopt a child that is not the biological child of either, many states require them to be married. With nationwide access to marriage, same-sex couples can now satisfy that prerequisite in every state. Only Mississippi has a separate law barring two people of the same gender from jointly adopting a child, though one has to suspect that law will be challenged and invalidated at some point. (The Movement Advancement Project provides helpful tracking on these issues **here (<http://www.lgbtmap.org/equality-maps/foster-and-adoption-laws>)**.)

Second, when a person seeks to adopt the biological child of a romantic partner, different rules apply. Many states provide by statute for adoption by a stepparent (as long as the child's other legal parent is out of the picture—never recognized, rights terminated, or dead). Stepparent adoption provisions allow the parent's spouse to adopt without severing the parent's rights (most adoptions substitute one parent-child relationship for another) and, typically, bypass some of the steps in the adoption approval process, such as home visits. In theory at least, the parent who married the would-be adoptive parent has undertaken the state's usual screening role. With equal access to marriage, same-sex spouses should be able to adopt in all fifty states.

When same-sex couples choose not to marry, however, the ability to adopt a partner's child will vary by state. In some states, an unmarried partner, gay or straight, is never allowed to adopt the partner's child. In others, courts have allowed same-sex partners to adopt via a so-called "second-parent adoption," in which the biological parent and partner jointly petition to adopt (even though the biological parent is already legally attached to the child). But many of the courts that recognized this type of adoption did so

because same-sex couples, without a right to marry, did not have access to the usual procedure—stepparent adoption. Second-parent adoption was thus used as an equitable remedy for the law’s denial of equality for those couples. It remains unclear whether those states will continue to allow *unmarried* same-sex couples to use second-parent adoption to shore up the relationship between the second parent and the child, or whether those couples will, like heterosexual couples, be required to marry to avail themselves of the adoption privilege.

**Gamete Donation.** The parentage rules when conception involves at least one gamete donor are varied and complex. But let’s focus on the one situation in which *Obergefell* is likely to make a difference.

When a married woman conceives a child using donor sperm, her husband, in most states, is deemed the legal father as long as he consented to the insemination or in vitro fertilization. This rule both cements the tie between husband and child and provides a protective shield against claims by donors. After *Obergefell*, lesbian married couples should be able to take advantage of the same rule of legal parentage, provided the spouse consents to conception.

What about in states that do not have a specific rule regarding assisted reproduction? A female spouse should be able to avail herself of the marital presumption, explained above, which deems a married woman’s spouse the legal parent of any child to which she gives birth. Many states that adopted marriage equality before *Obergefell* were inclined to apply the marital presumption equally to same-sex couples. But whether other states will do the same is not yet clear. The risk of relying on the marital presumption is that it is usually rebuttable. And if proof of no genetic tie is a sufficient basis to rebut the presumption—as in the case of a husband who was cuckolded—the presumption will be of little benefit to a lesbian spouse who clearly does not have such a tie to her spouse’s biological child.

When an unmarried woman conceives a child using donor sperm, the child, most likely, has no legal father. Practically speaking, anonymous donors could not have rights or obligations because their identity is unknown. Known donors could, conceivably, but a majority of states apply a rule of non-parentage to all donors, regardless of any current or past connection to the mother. These rules are unlikely to be affected by *Obergefell*, although many contested lesbian co-parent cases, discussed below, also involve donor sperm.

**Lesbian Co-Parents.** There have been a huge number of cases in the last two decades involving lesbian co-parents, who jointly participated in the decision to have a child, but later parted ways. The question in most of these cases is whether the non-biological

mother can be recognized as a legal parent to her partner's biological child. The answer varies tremendously by jurisdiction.

In some jurisdictions, the lesbian co-parent can be recognized as a *de facto* parent, by virtue of the functional parent-child relationship actively fostered by the biological mother and carried out by the co-parent. (One *de facto* parentage case is discussed [here \(https://verdict.justia.com/2014/08/20/mommy-momma-determining-parentage-new-family\)](https://verdict.justia.com/2014/08/20/mommy-momma-determining-parentage-new-family).) This status seldom results in rights equal to the biological parent's, but can be the basis for awarding visitation rights. This doctrine, however, has been rejected by courts in many states, including, in a controversial New York case, *Debra H. v. Janice R.* (<http://law.justia.com/cases/new-york/court-of-appeals/2010/2010-03755.html>) (discussed [here \(http://writ.news.findlaw.com/grossman/20100511.html\)](#) and [here \(http://writ.news.findlaw.com/grossman/20100525.html\)](#)).

In other jurisdictions, courts have enforced co-parenting agreements, or at least expressed a willingness to do so in the right case. The Supreme Court of Ohio, for example, held in *In re Mullen* (<http://law.justia.com/cases/ohio/supreme-court-of-ohio/2011/2011-ohio-3361.html>) (2011), that while a parent cannot be ordered to share custody or control with a third party, a parent “may voluntarily share with a nonparent the care, custody, and control of his or her child through a valid shared-parenting agreement.” (This case is discussed in detail [here \(https://verdict.justia.com/2011/08/23/do-lesbian-co-parents-have-rights\)](https://verdict.justia.com/2011/08/23/do-lesbian-co-parents-have-rights).) Other states, including North Carolina and **Kansas** (<https://verdict.justia.com/2013/04/16/parenthood-by-contract>), have issued similar rulings.

*De facto* parentage can preserve a functional parent-tie, but only if the law allows it and the facts supporting the claim can be proven. It is the least certain of potential ties between parent and child and the least likely to be recognized across state lines. But it remains relevant for lesbian couples who choose not to marry—or for those whose children were conceived and born before marriage became legal in their home states. A Maryland court just ruled that a lesbian co-parent dispute was unaffected by *Obergefell* because the child was born before the ruling. Whether or not the two women had the option to marry did not change their status—they were an unmarried couple who jointly participated in the birth and rearing of a child and were subject to the rules governing all such couples. The lesbian co-parent in this case, *Conover v. Conover* (<http://law.justia.com/cases/maryland/court-of-special-appeals/2015/2099-13.html>), did not succeed in being recognized as a second parent to her partner's biological child. She was deemed a legal stranger whose access to the child could be unilaterally severed

by the child's biological mother. And the lesbian co-parent in a recent Missouri case, *McGaw v. McGaw* (<http://law.justia.com/cases/missouri/court-of-appeals/2015/wd77799.html>), was told not only that she would receive no special dispensation because marriage was not available to the couple prior to the child's conception or birth, but also that the availability now of marriage makes de facto parentage less necessary as a doctrine. Future co-parents may face even greater hurdles in trying to establish legal ties to a jointly raised child.

## Conclusion

*Obergefell* resolved some issues and left others open, as I have tried to demonstrate. But, as is always the case in the common-law system, it is difficult to predict which questions will arise (and which ones most often) and how courts will respond to them. We will watch and wait. It is clear, however, that with universal access to marriage, courts will be less inclined to protect parent-child ties established in non-marital, same-sex families.



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