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SEXUAL ORIENTATION & GENDER IDENTITY



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FROM THE SPECIAL EDITORS

Examining How We Discuss and Advocate Cases Involving Sexual Orientation and Gender Identity Issues

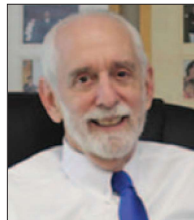
SOGI is a relatively new acronym. It stands for sexual orientation and gender identity.

Only starting 150 years ago, society began to draw lines between those people who were deemed heterosexual and those who were classified as homosexual. Since then, society has developed other terms to describe an individual's sexual orientation, referring to one's emotional, romantic, or sexual attraction to other

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people. Within the last 50 years, additional terms were devised to describe one's gender identity, meaning one's innermost understanding of self as a man, a woman, a blend of both, or neither.

While lesbian, gay, bisexual and transgender are represented in the commonly used acronym LGBT, this acronym fails to recognize an increasingly diverse range of sexual orientations and gender identities, especially as more people identify as being somewhere on a spectrum, not some hard boundary of this or that. As a result, in addition to the expanded LGBTQ+ acronym, there is a growing acceptance of SOGI as an umbrella term when speaking about these issues.



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This issue of *New Jersey Lawyer* explores SOGI as it relates to various areas of the law. Two articles explore how sexual orientation and gender identity impact immigration law. Colleen McCafferty examines asylum-based immigration issues for foreign nationals fleeing discrimination and violence on account of their sexual orientation or gender identity. Samantha Chasworth explores the legal challenges that arise for LGBTQ+ individuals in family-based immigration.

Next, Deb Guston focuses on how LGBTQ+ people are impacted by recent changes in statutory law governing assisted reproduction and fertility care in New Jersey. Guston also identifies deficiencies in existing law that create impediments to family-building for LGBTQ+ people. Next, we, the special co-editors take a close look at the new law expediting confirmatory adoptions

for all non-genetic parents and the importance of these adoptions for LGBTQ+ families.

The article by Jodi Argentino focuses on the impact of a parent's newly-understood or revealed sexual orientation or gender identity. She writes how early intervention, both psychological and legal, is essential to ensure continued positive co-parenting and healthy parent-child relationships.

Rachel Holt and Adalgiza Núñez each examine SOGI bias in the criminal justice system. Holt explores how bias impacts jury trials; Núñez writes about transgender women in detention.

Erika M. Medina reviews gender identity discrimination in the provision of health care and in medical treatment, and what state and federal protections are available.

Celeste Fiore discusses the landmark 2018 Babs Siperstein law which changed

how gender markers are handled on New Jersey birth certificates and how that impacts other identification documents. They then address implications and considerations that a post-Babs Siperstein law world requires.

Mark Friedman examines the intersection of LGBTQ+ families and elder law, especially in regard to the pros and cons of obtaining legal recognition of relationships and Medicaid planning.

Finally, Derek Demeri looks at the legal needs of sex workers under New Jersey law and its intersectionality with SOGI issues.

Included at the end of this issue is a definitions and guidelines resource compiled by the New Jersey State Bar Association's LGBT Rights Section. We expect this edition of the magazine to shed light on how sexual orientation and gender identity impact various legal issues. ☪



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Why Do I Have to Adopt My Own Child?



The Need for Confirmatory Adoptions for Children Conceived by ART and New Jersey's New Confirmatory Adoption Law

By Bill Singer and Rebecca Levin Nayak

Why do you have to adopt your own child? If you did not gestate the child or contribute genetic material, you are not a legal parent without an adoption or parentage order, even if you are identified as a parent on your child's birth certificate.

The necessity to adopt is particularly imperative for the LGBTQ+ community. To build families, many LGBTQ+ parents rely on assisted reproductive technology (ART) through the use of donated or purchased gametes and surrogacy. ART procedures can include at-home insemination, intrauterine insemination, in vitro fertilization, surrogacy and reciprocal IVF (where one parent provides ovum and the other parent gestates).

So what is the validity of the information on a birth certificate? The New Jersey Bureau of Vital Statistics will report on the birth certificate information provided at

the time of birth. If the couple is married or in a civil union at the time of birth and one parent carries the pregnancy, both names can appear on the birth certificate. Most people are surprised to learn that a birth certificate is not proof of one's parentage. Yet, that is the truth under New Jersey law and the law of many other jurisdictions in the United States and abroad.

In the case of *In re T.J.S.*,¹ the New Jersey Supreme Court affirmed the Appellate Division decision stating that under New Jersey law there are only three ways one can be a legal, recognized parent. One must:

1. gestate the child,
2. provide genetic material, or
3. obtain an adoption or parentage order.

The *T.J.S.* decision involved a married heterosexual couple who used a donated egg and a gestational carrier to conceive and gestate a child. Plaintiffs asked that the court apply the New Jersey Parentage Act,² which recognizes the parentage of the non-genetic parent in a marriage or civil union based on the rebuttable marital presumption. Under the parentage act, there is a rebuttable presumption that a married man is the father of a child born to his wife or who consents to his wife being inseminated with donor sperm under the supervision of certain listed medical personnel.³

The *T.J.S.* court declined to apply the marital presumption of the parentage act in a gender-neutral manner to that scenario. The court specifically held that a birth certificate alone does not confer or create parentage; nor does a birth certificate terminate parentage. The court stated that a birth certificate "simply records the fact of parentage as reported by others."

In addition to declining to apply the parentage act to this scenario, the court questioned the gender neutral application employed by a trial judge in the

Superior Court who extended the presumption of parentage to the non-gestational, non-biological spouse where her wife was artificially inseminated by a licensed physician during their marriage. *In re Robinson*,⁴ The *T.J.S.* court criticized the *Robinson* judge for using the "best interest" standard to determine parentage. The court expressed no view whether the same result could have been reached by a different analysis.

The ruling in *T.J.S.* contradicts the layperson's sense of the true value of a birth certificate. Birth certificates are commonly used for multiple purposes such as registering a child in school or obtaining a driver's license. Birth certificates can be used to prove where and when a person was born, their name at the time of birth and the gender marker assigned to them at that time, but are not confirmation of parentage.

The recent United States Supreme Court case of *Pavan v. Smith*, 582 U.S. – (2017) did not enhance the value of a birth certificate. In *Pavan*, two married same-sex female couples in Arkansas sued because the state refused to put both spouses' names on the birth certificate. Arkansas alleged that its birth certificates are for collection of biological data, although it offered no proof that opposite-sex couples were required to submit proof of biology. The United States Supreme Court ruled that Arkansas was unconstitutionally discriminating against same-sex couples by denying them the same rights, responsibilities and benefits that married opposite-sex couples have pursuant to *Obergefell v. Hodges*, 576 U.S. 644 (2015).

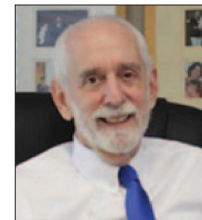
The holding of *Pavan* means that every state is required to treat same-sex couples the same as they do different-sex couples and list both spouses in a marriage on the birth certificate at the time of birth. However, this decision did not elevate the value of a birth certificate to make it a confirmation of parental rights.

Although few parents anticipate that

their legal rights may be challenged, a non-biological, non-gestational parent runs a risk if they do not obtain judicial confirmation of their legal status. For example, when applying for benefits for a child based on the parent's work record, agencies have denied claims if the only proof of parentage is a birth certificate.

Those parents who did not gestate or who do not have a genetic connection to the child should obtain a judicial order confirming their parentage. These adoption judgments are colloquially termed "confirmatory adoptions."

The necessity to obtain a confirmatory adoption disproportionately impacts the LGBTQ+ community, where often



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only one intended parent has a genetic or gestational connection to the child. Due to infertility issues, there are many other couples who use donated gametes from a third party to create their family. These couples also need to obtain judicial confirmation of their parental status.

State laws vary as to who is a parent. Determination of who is a parent could be made based on the law of the state where the family is located at the time the question is raised, not the state of birth. Thus, it is important for families who can benefit from New Jersey law to protect their legal parental relationship do so, now and here.

The case of *V.L. v. E. L.*, 577 U.S.—(2016) drives home that point. In that case, a lesbian couple living in Alabama had three children. All of the children were born to one woman; the second woman had no legal parentage rights. The couple moved to Georgia. While there, the non-biological parent secured adoptions of all three children.

The couple subsequently moved back to Alabama and split up. The biological mother petitioned the Alabama court, requesting that the court not recognize the validity of the Georgia judgments. The Alabama Supreme Court found for the biological mother and refused to recognize the Georgia adoption judgments.

The United States Supreme Court unanimously reversed the Alabama Supreme Court. The court applied the full faith and credit clause of the United States Constitution, Article IV, section 1 of United States Constitution confirming a parent's legal parentage will be recognized throughout the country.

The portability of the adoption judgment allows a family to travel freely in the United States, move to a different state, and apply for government benefits. Furthermore, a confirmatory adoption judgment will remove any doubt as to the legality of the relationship in the context of issues with estate planning and taxation.

Additionally, worldwide, everyone understands and recognizes the concept of adoption. Thus, for United States citizens when traveling abroad, although not binding, that same judicial order can satisfy any questions as to who the parents are. There are many non-U.S. couples who use surrogacy and other ART services in the United States. Although those foreign couples can obtain confirmatory adoptions, those judgments may have limited effect once the foreign couple returns to their home jurisdiction.

Despite the importance of confirming a parent's rights through an adoption, many couples do not complete adoptions. There are many reasons: the false sense of security created by the birth certificate; bad legal advice; the invasiveness of the adoption process which traditionally requires a home study, numerous background checks, fingerprinting, and a court hearing, meaning missing time from work; discomfort with the idea of having to adopt a child born into an existing intact family; and the associated costs.

Fortunately, this year, the New Jersey legislature, through the advocacy of Sen. Nicholas Scutari, adopted a streamlined confirmatory adoption process. The law addresses some of the reasons that individuals and couples did not complete adoptions even where their parental status could be in question.⁵

The new law applies to couples who:

1. currently are or were married or in a civil union at the time of the child's birth,
2. have used donor material where the donor's parental rights have been terminated by operation of law, and
3. where the adopting parents' names are already on the child's birth certificate.

Where, in the past, there was a requirement for background checks and

a court hearing, both are now waived. Petitioners file a joint complaint providing certified copies of their marriage or civil union certificate and the child's birth certificate. In addition, petitioners supply an affidavit or certification from both parties as to how the child was conceived. That statement identifies any other persons involved, such as a known donor, so that the court may determine whether anyone else could claim parental rights.

When filing under the new law, best practices include, if applicable, providing the court with a certification from any medical professional involved confirming how the child was conceived. Also, if applicable, petitioners can include the invoice from a sperm bank or information as to a known or unknown donor.

Once approved, the court issues a Judgment of Adoption. This abbreviated procedure saves money, better uses judicial resources, and alleviates aggravation and intrusion into the family's privacy. By making the process more affordable and less invasive, this change is intended to increase the number of couples who obtain confirmatory adoptions to legally and fully protect their families. ♪

Endnotes

1. *In re T.J.S.*, 212 N.J. 334, 54 A. 3d 263 (2012), affirming by a divided court 419 N. J. Super. (App. Div. 2011).
2. N.J.S.A. 9:17-43
3. N.J.S.A. 9:17-43
4. *In re Parentage of Robinson*, 383 N. J. Super. 165, 890 A. 2d 1036 (Ch. Div. 2005).
5. N.J.S.A. 9:17-69, et seq.